

RECEIVED

SEP 03 2009

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED

2009 SEP 2 AM 10 51

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

) Subcases: 63-07539

)

Case No. 39576

) MEMORANDUM DECISION AND
ORDER ON CHALLENGE (WHITTED'S
CLAIMS)

)

) ORDER OF RECOMMITMENT

)

)

Ruling: Order affirming Special Master's recommendation of award of attorney's fees to Sarah Jane Smith and Order of Recommitment for further proceedings on amount of award.

I.

APPEARANCES

JOHN M. MARSHALL and J. WILL VARIN, Givens Pursley LLP, Boise, Idaho, on behalf of the Claimant/Respondent, Sarah Jane Smith.

KIMBELL D. GOURLEY and REID W. HAY, Trout, Jones, Gledhill, Fuhrman, P.A., Boise, Idaho, on behalf of the Objector/Challenger, Craig Whitted.

JOHN M. MELANSON, Presiding Judge of the SRBA, presiding.

II.

PROCEDURAL BACKGROUND AND FACTS

1. On, April 13, 1990, Sarah Jane Smith's predecessor-in-interest, David Vastine, filed a *Notice of Claim* in the Snake River Basin Adjudication ("SRBA") for water right

63-07539 claiming a quantity of .40 cfs or 40 afy of groundwater for year-round stockwater use in Canyon County with a priority date of February 27, 1972.

2. On December 19, 2006, the Director of the Idaho Department of Water Resources (“IDWR”) filed a *Directors Report for Irrigation and Other Rights, Basin 63, Part 3*, which included a recommendation for water right 63-07539.

3. On June 19, 2007, Sarah Jane Smith (“Ms. Smith”) filed an *Objection* to the recommended Place of Use element.

4. On January 2, 2008, Craig Whitted (“Mr. Whitted”), acting *pro se*, filed a *Motion to File Late Objection* to the Point of Diversion element, alleging that Ms. Smith has no rights to the property on which the point of diversion (well) is located.

5. On January 10, 2008, Ms. Smith filed a *Standard Form 5- Stipulated Elements of a Water Right* (“SF-5”) for 63-07539, with IDWR’s concurrence, stipulating to a change in the Point of Diversion element to a location on Mr. Whitted’s land. Initially, both the *Director’s Report* and the license did not list a point of diversion for this water right on Mr. Whitted’s property. However, during further investigation of the right following Ms. Smith’s *Objection*, IDWR determined that the point of diversion was incorrectly described in both the license and in the *Director’s Report*. The SF-5 resolved Ms. Smith’s objection.

6. Following a hearing on Mr. Whitted’s *Motion to File Late Objection*, the Special Master issued an *Order Granting Motion to File Late Objection* on February 13, 2008. In support of the *Motion*, the Special master summarized the basis for Mr. Whitted’s *Motion*:

[O]ne of the points of diversion (i.e. location of groundwater well) . . . is now claimed to be located on Mr. Whitted’s property, and that the claimant of the water right Sara Jane Smith, is not authorized to occupy Mr. Whitted’s property for this purpose. It is Mr. Whitted’s stated contention that the subject well does not belong to the claimed 1972 water right.

Order Granting Motion to File Late Objection. The Special Master granted the *Motion* based on the criteria of I.R.C.P. 55(c). The Special Master found that Mr. Whitted had presented a “meritorious position” by demonstrating that the point of diversion was located on his property. The Special Master found that Mr. Whitted demonstrated good cause for his untimeliness, that his position was meritorious, and that there would be little likelihood of prejudice to other parties in allowing the filing of the late objection. The *Motion* was granted.

7. Thereafter, on May 16, 2008, Ms. Smith, through counsel, served discovery requests on Mr. Whitted. Mr. Whitted responded as follows:

WHITTED WELL

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 and 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.

Varin Aff. (Sept. 12, 2008).

8. At the pre-trial conference held July 1, 2008, the parties discussed the issues for trial and concluded that the matter could be decided on summary judgment. The parties stipulated to three facts. First, that there was dispute among the predecessors-in-interest over the location of the well at the time the drill rig showed up and the well was drilled without the permission of Mr. Whitted’s predecessor. Second, that the well is located on Mr. Whitted’s property. Third, since the time the well was drilled it has been providing

water to the Smith property. Following the pretrial conference, the Special Master issued an *Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions* on July 2, 2008.

9. On July 31, 2008, Ms. Smith filed a *Motion for Summary Judgment*, together with supporting affidavits and briefing. Ms. Smith argued in her Motion that she had a prescriptive right to use the well after years of use and therefore also established a valid water right. On that same date, Mr. Whitted, acting *pro se*, also filed a *Motion for Summary Judgment*, together with an affidavit in support. The *Motion* asserted:

This water right should not exist *on this well* because it has been claimed in trespass.

Because of the Supreme Court case *Rabido et al v. Furey Idaho 1920* says that 'a valid water right cannot be initiated by using anothers ditch against his will, or by any other trespass.'

(emphasis added). The affidavit filed in support of the *Motion* provided in relevant part:

I was living at home at the time the well was drilled. My father was upset because the neighbor was setting up to drill a well. He went to the neighbor and said he was setting up the rig on his property (Earl's). The neighbor drilled the well anyway on Earl's property. My father was angry at the trespassing. Because of financial reasons he didn't pursue it, any farther.

Moore Aff.

10. On September 10, 2008, Mr. Whitted, now represented by an attorney, filed through counsel, a *Cross-Motion for Summary Judgment*, together with supporting affidavits and *Memorandum*. The *Cross Motion* asserted that the water right had been initiated in trespass but that the subsequent use of the well had been permissive.

11. Also on September 10, 2008, Ms. Smith filed a *Response to Whitted's Motion for Summary Judgment/Dispositive Motion and Motion to Strike Cross-Motion for Summary Judgment and all Supporting Documents*. Ms. Smith asserted that Mr. Whitted had changed legal theories from trespass to permissive use, and as a result, the Court should

strike the *Cross-Motion* and allow the case to proceed upon the motions for summary judgment already filed regarding the trespass theory. In the alternative, should the Court allow the filing of the *Cross Motion*, Ms. Smith requested an award of her reasonable attorney fees and costs associated with the filing of her July 31, 2008 *Motion for Summary Judgment*.

12. On September 12, 2008, Mr. Whitted filed a *Memorandum in Opposition to Smith's Motion to Strike Cross-Motion for Summary Judgment and all Supporting Documents*. On September 17, 2008, after a hearing on the *Motion to Strike*, the Special Master issued an *Order on Motion to Strike; Order re: Attorney's Fees and Costs; Order Dismissing Objection; Order Vacating Hearing on Motions for Summary Judgment; and Order Requesting Statement from Parties* (hereinafter "*September 17 Order*"). The Special Master denied the *Motion to Strike* and vacated hearings on Ms. Smith's *Motion for Summary Judgment* and Mr. Whitted's *Cross-Motion for Summary Judgment*. The Special Master reasoned that if the use of well had been by permission then the water right was valid and the issue before the Special Master was more appropriately the access to the well. As a result, the Special Master treated the *Cross-Motion* as an amendment to the pleadings and granted Ms. Smith's request for costs and attorney fees, directing the claimant to file a memorandum of costs and fees. The Special Master found that the payment of the claimant's costs and attorney's fees was 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. Additionally, the Special Master dismissed Mr. Whitted's objection and stated his intent to issue a *Special Master's Report and Recommendation* recommending 63-07539 with the elements agreed upon in the Standard Form 5.

13. On October 1, 2008, Ms. Smith filed a *Verified Memorandum of Costs and Attorneys' Fees*, and moved for an award totaling \$23,456.71. On that same date, Ms. Smith filed the *Affidavit of John M. Marshall in Support of Sarah Jane Smith's Application for Costs and Attorneys' Fees*.

14. On October 14, 2008, Mr. Whitted filed a *Motion to Disallow Costs and Attorneys' Fees* (hereinafter "*Motion*"), together with a *Memorandum* in support thereof. Mr. Whitted argued that he should not be required to pay costs and attorney fees because his original objection was broad enough to include both positions of trespass and of permissive use, and therefore I.R.C.P. 15(a) is inapplicable. He also argued that the amount of costs and attorney fees were unreasonable and excessive.

15. On October 18, 2008, Ms. Smith filed a *Response to Whitted's Motion to Disallow Costs and Fees*.

16. On November 21, 2008, Mr. Whitted filed *Craig Whitted's Reply Memorandum in Support of Motion to Disallow Costs and Fees*.

17. On December 16, 2008, the 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*. In his recommendation, the Special Master recommended the following: 1) that water right 63-07539 be decreed in the name of Sarah Jane Smith in accordance with the *SF-5*; 2) that judgment for the award of attorney fees be entered in favor of Ms. Smith, and against objector Craig Whitted in the amount of \$23,140.71 based on I.R.C.P. 15(a); and 3) that Sarah Jane Smith's claim for an easement by prescription be dismissed without prejudice. Both parties have filed statements that they did not intend to proceed with the quiet title action in the SRBA.

18. On January 28, 2009, Mr. Whitted filed a *Motion to Alter or Amend*. He asserted that the Special Master erred in recommending an award of costs and attorney fees under I.R.C.P. 15(a). Mr. Whitted did not contest any elements of the subject water right.

19. On April 1, 2009, after oral argument on the *Motion to Alter or Amend*, the Special Master issued an *Order Denying Motion to Alter or Amend*, on the issue of costs and fees.

20. On April 14, 2009, Mr. Whitted timely filed a *Notice of Challenge* to the Special Master's *Order Denying Motion to Alter or Amend*.

III. ISSUES RAISED ON CHALLENGE

Mr. Whitted raises three issues on Challenge. The Court summarizes the issues as follows:

1. Whether the Special Master erred in recommending costs and attorney fees to Ms. Smith pursuant to I.R.C.P. 15(a)?
2. Whether the Special Master erred in the amount recommended?
3. Whether the Special Master erred in recommending costs and attorney fees incurred both before and after Mr. Whitted's change in position?

IV. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on July 21, 2009. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or July 22, 2009.

VI. STANDARD OF REVIEW OF SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. *AOI*, section 13f; I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,¹ although perhaps conflicting, evidence. *Higley*, 124 Idaho at 534, 861 P.2d at 104.

B. Conclusions of law of a special master.

A special master's conclusions of law are not binding upon a district court, but they are expected to be persuasive. I.C. §42-1412(5); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997). To the degree that the

¹ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

district court adopts the special master's conclusions of law, those conclusions become those of the court. *Id.* at 740, 947 P.2d at 413; *Oakley Valley Stone* 120 Idaho at 378, 816 P.2d at 334. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Id.* Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, Federal Practice and Procedure § 2588 (1995); *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

VII. DISCUSSION

A. The Special Master did not err in Awarding Attorney's Fee's pursuant to I.R.C.P. 15(a).

Mr. Whitted argues that the Special Master erred in recommending the award of costs and attorney's fees pursuant to I.R.C.P. 15(a). This Court disagrees. I.R.C.P. Rule 15(a) provides as follows:

Amended and supplemental pleadings - Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires, *and the court may make such order for the payment of costs as it deems proper*. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of

the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(emphasis added). In support of the award of attorney's fees, the Special Master relied on the case of *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210(1986). In *Curtis*, the Idaho Supreme Court upheld the award of attorney's fees under I.R.C.P. 15(a) where the filing of the amended complaint was made conditional on the payment of a portion of attorney's fees. The amended complaint raised additional allegations and sought additional relief but also sought dismissal of fourteen individuals named in the original complaint. The fees awarded were associated with the representation of the fourteen individuals. The Idaho Supreme Court reasoned:

The rule specifically commits the imposition of conditions on filing an amended complaint to the sound discretion of the district court. Absent abuse of that discretion, the district court's decision will be upheld. Under the facts of this case, we think the district court did not err in conditioning filing of the amended complaint upon the payment of attorney fees. In his initial complaint, appellant had named the individual members of the zoning commission and city council as well as the mayor and city attorney as defendants. As a result, the city was required to obtain outside counsel to defend against the action at considerable expense. Nearly, three years into the litigation, appellant dismissed as defendants all fourteen individually named city officials on grounds that they were not 'real parties in interest.' Clearly these individuals were prejudiced by the bringing of an admittedly groundless action against them in their individual rather than representative capacities. . . . The city incurred substantial legal expense in defending the action against the named individuals.

Id. at 31, 720 P.2d at 214. The Court also noted that the "fees awarded upon the filing of the first amended complaint could easily have been included in the final award of costs and fees [under I.C. §12-121].

In this case Mr. Whitted did not move to amend his *Objection*. The Special Master in ruling on Ms. Smith's *Motion to Strike* concluded that Mr. Whitted changed his legal theory in the *Cross-Motion for Summary Judgment* from what was asserted in the *Objection* which resulted in a in a *de facto* amendment of the original *Objection*. The Special Master concluded that in the objection Mr. Whitted alleged a trespass defense to the water right and on *Cross-Motion* changed his legal theory to one of permissive use in defense of the access to the well.

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 or the future use of water under the 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.

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 at 3. The Special Master denied the *Motion to Strike*, and allowed the case to proceed on the amended legal theory but ordered attorney's fees pursuant to I.R.C.P. 15(a).² The Special Master then requested statements regarding how the parties wanted to proceed with the issue of access to the well which does not involve an element of a water right and is an issue that could be decided in front of the Special Master or brought in a separate action outside of the SRBA. The parties agreed to pursue the issue outside of the SRBA.

In reviewing the Special Master's actions consistent with the applicable discretionary standard of review, this Court finds that the Special Master did not abuse discretion. This Court has reviewed the file and the transcript from the pre-trial hearing in detail. Mr. Whitted lodged a *Standard Form 1 Objection* and moved for leave of Court to file a late objection. For the sake of simplicity, the *Standard Form 1 Objection* is in a "check the box" format and does not require particularity. As such, the allegations made in the *Standard Form 1* need to be properly considered in this context. Mr. Whitted did not object to the validity of the water right rather he objected to the Point of Diversion (POD) element for the water right. The reasons given in support of his objection state that the claimant Ms. Smith has no rights on the property where the well is located and

² The payment of costs and fees was not made a condition of proceeding on the amended pleading, rather costs and fees were simply ordered. Mr. Whitted was not given the option of amending his pleading and paying costs and fees, proceeding on the original *Objection* or withdrawing his *Objection*.

that the drilling reports, field report, proof of beneficial use and license all describe the point of diversion on what is now the Smith property. Mr. Whitted also states that the permit application for the right provides that the applicant owns the property where the well is to be drilled. However, because leave of Court is required to file a late objection, Mr. Whitted was required to present the basis for his *Objection* to the Special Master.³ A transcript from the hearing on the *Motion to File Late Objection* was not made part of the record. In granting the filing of the *Late Objection* the Special Master concluded:

[O]ne of the points of diversion (i.e. location of groundwater well) . . . is now claimed to be located on Mr. Whitted's property, and that the claimant of the water right Sara Jane Smith, is not authorized to occupy Mr. Whitted's property for this purpose. It is Mr. Whitted's stated contention that the subject well does not belong to the claimed 1972 water right.

Order Granting Motion to File Late Objection. In response to Ms. Smith's request for discovery, among other things, Mr. Whitted responded as follows:

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.

Varin Aff. (Sept. 12, 2008). Subsequently, at the pre-trial hearing the parties discussed the issues for trial. Mr. Whitted discusses two defenses to the point of diversion for the water right: first, that the license previously issued for the right incorrectly describes the point of diversion; and second, that a water right may not be initiated in trespass. The Special Master addresses both the first issue and the trespass defense:

SPECIAL MASTER: In other words, the license said that the particular well is not on your property.

MR. WHITTED: That's correct.

³ A *Motion to File Late Objection* is reviewed under an I.R.C.P. 55(c) standard. A "meritorious defense" is one of the criteria the movant must demonstrate.

SPECIAL MASTER BOOTH: Well, believe me, I've seen it a hundred times in the process of the adjudication where some of the old documents were incorrect, you know licenses and other documents . . . just because there perhaps is a mistake in the document doesn't necessarily invalidate the water right. The real question to me is this trespass issue.

Transcript at 12.

SPECIAL MASTER BOOTH: What is it you anticipate—what disputed facts are your witnesses going to testify to?

MR. WHITTED: They're going to testify on trespass of the well. . . .

Transcript at 19.

MR. WHITTED: I have got this lady who digs trenches across my place, trespassing.

Transcript at 19-20.

MR. WHITTED: In my opinion the facts are that the water right does not hook to that well. Are they using the well? Yes. Is it hooked to that water right? I don't think so. That's my opinion. But we can go from there with whatever paperwork you want to do.

Transcript at 23. Thereafter the parties stipulated to certain facts and proceeded on the basis that because there were no genuine issues of material fact the remaining legal issue could be decided on summary judgment.

MR. MARSHALL: Your honor, the stipulated facts I think we can agree on today are that there was a dispute about the well—the well was drilled where it was and it ends up being on Mr. Whitted's property. This well is the same well that's been used since 1967 to supply stock water to my client's property continuously from '67 through 2008. And the sole question we have to resolve here, the dispute between the parties, is legally that the fact that this well that's on Mr. Whitted's property, does the fact that it's on this property legally make it so that it is not a recognizable point of diversion under the right in question here. I think that's all we need to answer.

SPECIAL MASTER BOOTH: Okay. . . So what I am going to rule here today is I am going to adjust the trial schedule. I'm going to vacate the current July 18, 2008 trial, I'm going to set a deadline for the filing of motions for summary judgments of July—does July 31st give you enough

time to file motions for summary judgment, Mr. Marshall and/or Mr. Whitted?

MR. WHITTED: I suppose we could figure something out.

Transcript at 24-30.

Based on the representations made during the pre-trial hearing as well as the understanding of the parties at the conclusion of the hearing it is abundantly clear that Mr. Whitted was pursuing a trespass defense to the validity of the point of diversion for the water right. The legal issue being the affect of continuous use of a point of diversion initiated in trespass. Mr. Whitted's *Motion for Summary Judgment* further confirms his understanding. The *Motion* asserted:

This water right should not exist *on this well* because it has been claimed in trespass.

Because of the Supreme Court case Rabido et al v. Furey Idaho 1920 says that 'a valid water right cannot be initiated by using anothers ditch against his will, or by any other trespass.'

(emphasis added). The affidavit filed in support his *Motion* also provided in relevant part:

I was living at home at the time the well was drilled. My father was upset because the neighbor was setting up to drill a well. He went to the neighbor and said he was setting up the rig on his property (Earl's). The neighbor drilled the well anyway on Earl's property. My father was angry at the trespassing. Because of financial reasons he didn't pursue it, any farther.

Moore Aff.

Ms. Smith's *Motion for Summary Judgment* is also consistent with this understanding. In her *Motion*, Ms. Smith argues the legal affect of continuous use of a water right initiated in trespass-- essentially a prescriptive use argument. Up to this point in the proceedings Mr. Whitted did not once allege or disclose that Ms. Smith's, or her predecessors-in-interest's, use of the well had been by permission. Had this assertion been made prior to the pre-trial hearing or at the pre-trial hearing, the matter could not have been decided on summary judgment. First, the new allegation of permissive use essentially negates the trespass defense to the validity of a water right or point of

diversion. This became clear when the Special Master dismissed the *Objection* and recommended the water right in accordance with the *SF-5* after Mr. Whitted alleged permissive use. Second, the allegation of permissive use necessarily creates a second issue and a genuine issue of material fact regarding the nature of the use authorizing access to the well (i.e. revocable license, easement etc.). This issue would not have been present had the case proceeded on the trespass defense as any prescriptive use of the water right would have also included access to the well. Mr. Whitted's change in legal theories nullified the very purpose of vacating the trial in lieu of deciding the case on summary judgment. For purposes of this analysis, Mr. Whitted's underlying motives (deliberateness, inadvertence, failure to appreciate the significance of his legal theory until consulting an attorney, etc.) for failing to assert permissive use at least by the pre-trial conference are largely irrelevant. Pro se litigants are held to the same standards as attorneys. *Ade v. Batten*, 126 Idaho 114, 118, 878 P.2d 813, 817 (Ct. App. 1994) (citing *Golay v. Loomis*, 118 Idaho 387, 393, (1990); *Golden v. Condor, Inc. v. Bell*, 112 Idaho 1086, 739 P.2d 385 (1987)). The fact is Mr. Whitted's representations directly influenced how the case proceeded and as a result Ms. Smith incurred costs and attorney fees preparing a summary judgment motion that became meaningless once Mr. Whitted changed his legal theory. Although the Special Master in the exercise of discretion permitted Mr. Whitted to change legal theories midstream, also in the exercise of discretion he did not err in requiring Mr. Whitted to reimburse Ms. Smith for the costs and fees associated with the summary judgment.

B. The Amount of Fees Recommended.

Mr. Whitted argues in the alternative that the amount of the attorney's fees is excessive. No evidence was submitted by Mr. Whitted to rebut the reasonableness of the amount of the costs and fees. The Special Master in the exercise of discretion and in applying the criteria of I.R.C.P. 54(e)(3) found the fees to be reasonable. This Court agrees in part and disagrees in part. The pivotal point in this case is the pre-trial hearing. It was not until the pre-trial hearing that the issues were defined sufficiently enough for the Special Master to determine how the case should proceed. While the representations

made in Mr. Whitted's *Motion to File Late Objection* and discovery response are consistent with a trespass theory of the case, the representations are also somewhat inconclusive.⁴ The discovery interrogatories propounded on Mr. Whitted were never made part of the record and Mr. Whitted's deposition was never taken. However, at the pre-trial conference Mr. Whitted at least allowed the Special Master and opposing counsel to believe that the legal contest to the water right was based solely on trespass and the case proceeded accordingly with Mr. Whitted's approval. Put differently, Mr. Whitted argues on *Challenge* that he never changed legal theories and his theory of the case has always remained consistent. Whether or not that is subjectively true, objectively Mr. Whitted led everyone to believe differently at the pre-trial conference. Had Mr. Whitted alleged permissive use at the pre-trial conference or not stipulated to certain facts, the parties would not have proceeded with motions for summary judgment in lieu of the trial. He would have also had the opportunity to attempt to reconcile a permissive use theory with his previous, albeit inconclusive, representations. However, the same is not true after the pre-trial conference. Accordingly, it was the costs and fees associated with the preparation of the summary judgment motion after the pre-trial hearing that were incurred unnecessarily as a result of the change in legal theories and should be recoverable under I.R.C.P.15 (a). This is not an award under I.C. § 12-121. Furthermore, the case is not over. The issue surrounding access to the well remains. All of the investigation surrounding the circumstances of the drilling of the well and the history of its subsequent use, conducted both prior to and in preparation of the motion for summary judgment are relevant to the issues surrounding access and therefore should not be recoverable pursuant to I.R.C.P. 15(a).

VIII.

ORDER

Based on foregoing, the following are hereby ordered:

1. The Special Master's recommendation awarding costs and attorney's fees pursuant to I.R.C.P. 15(a) is affirmed.

⁴ The Special Master also noted the ambiguity.

2. The matter is recommitted to the Special Master for recalculation of the amount of costs and fees and consistent with this *Order*. Specifically, 1) subtract the \$8,437.00 amount incurred up through the pre-trial conference, and 2) parse out and subtract fees associated with preparing and filing motion for summary judgment (investigation, briefing, witnesses interview, legal research etc.) that have application in the proceedings pertaining to access.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated Sept. 2, 2009



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE (WHITTED'S CLAIMS) AND ORDER OF RECOMMITMENT was mailed on September 02, 2009, with sufficient first-class postage to the following:

SARAH JANE SMITH

Represented by:

J WILL VARIN

601 W BANNOCK ST

PO BOX 2720

BOISE, ID 83701-2720

Phone: 208-388-1200

SARAH JANE SMITH

Represented by:

JOHN M MARSHALL

601 W BANNOCK ST

PO BOX 2720

BOISE, ID 83701-2720

Phone: 208-388-1200

CRAIG WHITTED

Represented by:

REID W HAY

225 N 9TH ST, STE 820

PO BOX 1097

BOISE, ID 83701

Phone: 208-331-1170

DIRECTOR OF IDWR

PO BOX 83720

BOISE, ID 83720-0098

