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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
SEP 21 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	)	ORDER ON SUMMARY JUDGMENT
	)	(Reid)
Case No. 39576	)	
_____	)	Water Right Nos.: 22-13212 and 22-13503

I. PROCEDURAL BACKGROUND

Water rights 22-13212 and 22-13503 were claimed in the SRBA by Michael Reid. A *Partial Decree* for 22-13503 was issued November 24, 2008, after the *Objection* deadline had passed. No *Objections* were filed.

22-13503: Cedron Irrigation LLC, Mahogany Ranch Holdings, Teton Rainbow Ranch Inc., Trees Inc., and Wally Rothgeb Jr. (hereafter "Movants") filed a *Motion to Set Aside Partial Decree and to Allow the Filing of a Late Objection* in 22-13503. The court allowed the Movants to file late *Objections*, which are pending while the *Motion to Set Aside* is considered. The Movants' late *Objections* in 22-13503 dispute the 1904 priority date for 22-13503. Michael Reid did not file any objection in 22-13503.

22-13212: The Movants and Mr. Reid filed timely *Objections* in 22-13212. Mr. Reid's *Objection* seeks a 1901 priority. The Movants' *Objection* seeks to have the right disallowed, claiming it is duplicative of another claim with a 1969 priority.

Both Mr. Reid and the Movants moved for summary judgment in both cases. Mr. Reid argues that both rights are based on water right 22-405 from *Rexburg Irrigation Co. v. Teton Irrigation Canal Co.* (6th Dist., Fremont Co., Dec. 16, 1910) (hereafter "*Rexburg Decree*"). The Movants assert that Mr. Reid does not have a valid claim to 22-405. Water right 22-405 was decreed with a June 1, 1904, priority. Mr. Reid seeks a 1901 priority based on homesteading

documents. However, Mr. Reid asks that the court rule on summary judgment as to place of use. Mr. Reid did not submit any affidavits in support.

The Movants dispute that Mr. Reid is entitled to a portion of 22-405. The Movants moved for summary judgment on the priority and place of use. The Movants refer to the *Rexburg Decree* and to the *Affidavit of Larry Kunz* and the *Affidavit of Thomas J. Budge*. The Movants also filed a *Motion to Strike* Exhibit G to Mr. Reid's *Motion for Summary Judgment*. The *Motion to Strike* was **granted** at the hearing.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . ." to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are functions to be performed at trial. *Nelson v. Steer*, 118 Idaho 409, 707 P.2d 117 (1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

The Idaho Supreme Court has said that if the pleadings, depositions, admissions, or affidavits on file indicate that there is no genuine issue of material fact, then the moving party may be entitled to summary judgment.

Summary judgment is properly issued if the pleadings, depositions, and admissions on file, together with affidavits, indicate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). Summary judgment is properly issued when the non-moving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case.

Badell v. Beeks, 756 P.2d 126 (1988).

In addition, the moving party is entitled to judgment if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case. Summary judgments are to be decided upon actual factual disputes present in the record.

Idaho courts have consistently held that unsworn statements are entitled to no probative weight in passing on summary judgment. *Camp v. Jiminez*, 107 Idaho 882.

When a court considers a *Motion for Summary Judgment*, it can only consider evidence which would be admissible if offered at trial. *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 13 (2007). Evidence may be submitted in support of, or in opposition to a *Motion for Summary Judgment*. Such evidence may be presented by affidavit. Supporting affidavits, however, must be made on "personal knowledge shall set forth such facts as would be admissible in evidence" I.R.C.P. 56(c)

III. FACTS

The claims to 22-13212 and 22-13503 are for rights on Paradise Springs tributary to the Teton River. Water right 22-13503 was partially decreed by the SRBA Court on November 24, 2008, with a priority date of June 1, 1904. The claim for 22-13503 sought a priority date of June 1, 1904. The claim for 22-13503 is derived from 22-405 in the *Rexburg Decree* which determined the priority was June 1, 1904. The *Director's Report* recommended the elements as claimed. The claimant did not file an *Objection*.

Subcase 22-13212 has not been partially decreed in the SRBA. Subcase 22-13212 was claimed from Paradise Springs with a priority date of June 1, 1904. The *Director's Report* recommended the elements for 22-13212 as claimed. Mr. Reid filed an *Objection* to 22-13212, asserting the earlier priority date of May 23, 1901. The following facts were discussed on summary judgment:

- 1) Mr. Reid claims these rights as derivative of water right 22-405 decreed to J.J. Miller in the *Rexburg Decree*. The *Rexburg Decree* gave water right 22-405 a priority date of June 1, 1904. (*Motion for Summary Judgment* at 1-2.)
- 2) The *Rexburg Decree* gave 22-405 a place of use which did not include Mr. Reid's current place of use for 22-13503 and 22-13212. (*Budge Affidavit*, Ex. K, map.)
- 3) The *Director's Report* recommended both rights on Mr. Reid's land.
- 4) No administrative transfer ever moved the place of use for 22-405 or its derivative rights.

- 5) The *Rexburg Decree* gave 22-405 a priority of June 1, 1904.
- 6) The *Director's Reports* for 22-13212 and 22-13503 recommended both rights with a 1904 priority based on the *Rexburg Decree*.
- 7) The *Director's Report* agreed with Mr. Reid's assertion that the place of use in the *Rexburg Decree* was an error because "topography prevents water reaching the place of use."
- 8) The Movants assert that Mr. Reid's place of use could not have been irrigated from Paradise Springs at the time of the *Rexburg Decree* because it is located up-gradient from the ditch which carries water from Paradise Springs. (*Affidavit of Larry Kunz* at 2, ¶ 5-6.)
- 9) The claimant's predecessor, LeRoy Miller, claimed a right (22-11639) to irrigate 54 acres from Paradise Springs with a priority date of July 21, 1969. The place of use of that claim includes the 35.6 acres claimed under 22-13212 and 22-13503.

IV. ARGUMENT

A. Mr. Reid's Argument

1. **Priority.** Mr. Reid's *Motion for Summary Judgment* has two main points. First, he argues the priority date for 22-405 should be 1901 instead of 1904 as established in the *Rexburg Decree*. Mr. Reid bases his argument on homesteading documents he researched relating to the man who homesteaded and claimed water right 22-405 in the *Rexburg Decree*. Mr. Reid learned that John J. Miller (hereafter "J.J. Miller") filed a homestead claim with a May 23, 1901 date. Therefore, Mr. Reid claims the *Rexburg Decree* erred in ruling that the priority was 1904.

J.J. Miller filed a Homestead Application in 1896. He was unable to complete the Homestead Application because he could not get water to the tract for irrigation or culinary purposes. (*Motion for Summary Judgment*, Att. A-7.) J.J. Miller subsequently filed a second Homestead Application on land near Paradise Springs and a Notice of Water Right on May 23, 1901. (*Motion for Summary Judgment*, Att. C.) The Final Proof of Homestead Entry also indicates that J.J. Miller settled on the Paradise Springs land in 1901. (*Motion for Summary Judgment*, Att. A-13, A-12, A-11.)

2. **Place of Use.** Second, Mr. Reid argues in favor of the place of use recommended in the *Director's Report*. The *Rexburg Decree* for 22-405 did not include Mr. Reid's land in the place of use. Mr. Reid asserts that the decree contained a clerical error for the place of use. Mr. Reid explains that J.J. Miller's first homestead claim was cancelled in 1902 and his second

homestead claim was on a different place of use. He asserts that the *Rexburg* court used the legal description for the old homestead location instead of the correct legal description. IDWR agreed that Mr. Reid's land should be the current place of use.

B. The Movants Argument

1. Priority. The Movants argue that a priority date of 1901 cannot be proved as a matter of law. The Movants assert that if 22-13212 and 22-13503 are derived from 22-405 in the *Rexburg Decree*, then the doctrine of *res judicata* bars a priority earlier than 1904.

The Movants argue further, however, that these rights are not derivative of 22-405 since the place of use was not described in the *Rexburg Decree*. They argue that the *Director's Report* is not entitled to *prima facie* weight. Accordingly, the Movants assert that Mr. Reid must rely on his claim to 22-11639 which has a 1969 priority.

2. Place of Use. The Movants assert that IDWR improperly applied I.C. § 42-1427 to correct the legal description from the *Rexburg Decree*. I.C. § 42-1427 allows IDWR to recommend elements not defined by a prior license or decree. The Movants argue that since the *Rexburg Decree* described the place of use, it is not an undefined element. Therefore, IDWR cannot rely on I.C. § 42-1427 to correct the place of use.

V. ANALYSIS

The *Motions on Summary Judgment* must be analyzed by looking at the moving party's duties under I.R.C.P. 56. The moving party must show the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

The *Cross Motions for Summary Judgment* require analysis of three overarching issues.

- 1) Do "genuine issues of material fact" remain as to whether 22-13212 and 22-13503 may be derived from the *Rexburg Decree* for 22-405?
- 2) If these rights can be claimed from 22-405, does the doctrine of *res judicata* prohibit a claimed priority date earlier than 1904?
- 3) If these rights can be claimed from 22-405, do "genuine issues of material fact" remain as to the place of use?

A. Derivative of 22-405

The Movants argue that Mr. Reid cannot claim a portion of 22-405 as a matter of law. The Movants point to an overlapping claim by Mr. Reid's predecessor in subcase 22-11639 which claims a July 21, 1969, priority. The *Affidavit of Larry Kunz* states that a pump was

installed in 1969 and that there was no irrigation on Mr. Reid's land prior to 1969. Their argument is based additionally on the *Rexburg Decree*'s place of use for 22-405 which does not include Mr. Reid's land. Since it is undisputed that no administrative transfers moved the right to Mr. Reid's land, the Movants argue he cannot claim a portion of 22-405. The *Director's Report* for 22-13212 and 22-13503, however, views both rights as derivative of 22-405 and recommends the place of use on Mr. Reid's lands. The Movants argue that the *Director's Report* is not entitled to *prima facie* weight because it improperly applied I.C. § 42-1427 to the *Rexburg Decree*. Thus, the Movants assert Mr. Reid cannot claim part of the 22-405 right as a matter of law.

As part of its investigation of a water right, IDWR often relies on old decrees. IDWR has, in fact, recommended many water rights based on the *Rexburg Decree*. Old decrees often excluded elements of water rights which are now required. I.C. § 42-1427 explains that "undefined elements" of old decrees are difficult to establish due to the passage of time. Therefore, I.C. § 42-1427 provides for "undefined elements" to be determined based on conditions existing at the time the adjudication was commenced. The statute further requires that the director "shall include in his report recommendations for those elements not defined by the prior license or decree. . . ." Here, the *Rexburg Decree* established a place of use for 22-405. Thus, place of use is not an "undefined element" within the meaning of I.C. § 42-1427. Consequently, the Movants are correct that I.C. § 42-1427 is not a mechanism to correct elements of previously decreed water rights.

However, nothing in the *Director's Report* indicates that IDWR relied on I.C. § 42-1427 to recommend the place of use on Mr. Reid's land. It is common for IDWR to recommend a place of use other than the location listed in an old decree. Such recommendations are frequently based on an accomplished transfer pursuant to I.C. § 42-1425. That statute provides for changes in the place of use element which did not comply with I.C. § 42-222. The statute recognizes that such changes often occurred with the knowledge of other water users.

The *Director's Report* determined that these rights were derived from 22-405. IDWR apparently determined that Mr. Reid's land could be irrigated from Paradise Springs and that a valid accomplished transfer occurred or that a clerical error should be corrected.

In order for the court to determine on summary judgment that these rights could not be derived from 22-405, it would have to decide that there was no legal argument in support of

changing the place of use described in the *Rexburg Decree*. Because it is plausible that a valid accomplished transfer occurred, this court cannot rule as a matter of law that these rights are not derived from 22-405. Accordingly, the Movants' *Motion for Summary Judgment* is **denied in part**.

B. Priority Date of 1904

Mr. Reid argues that these two rights are derived from the *Rexburg Decree*, but asks for an earlier priority than the decreed priority of June 1, 1904. He seeks the earlier priority of 1901. In order to prevail on summary judgment that priority is May 23, 1901, Mr. Reid must show that there are "no genuine issue of material fact" regarding the 1901 priority. This he cannot do. The *Director's Report*, the claims, and the *Rexburg Decree* all identify a priority date of 1904. Even if the court considers all the evidence of J.J. Miller's homesteading, there is enormous evidence to the contrary supporting the 1904 date. Both rights were claimed with a June 1, 1904, priority. The *Director's Reports* for both rights recommended a June 1, 1904, priority. The *Rexburg Decree* established 22-405 with a priority of June 1, 1904. Consequently, the court cannot hold on summary judgment that the priority is 1901. Mr. Reid's motion is **denied**.

On the other hand, the Movants argue that Mr. Reid cannot seek a date earlier than June 1, 1904, based on the *Rexburg Decree* and the concept of *res judicata*. The Idaho Supreme Court has held that a prior decree entered in a private adjudication is binding on the parties (and their privies) to that decree. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). In that decision, the Court cited I.C. § 42-1401A which defines a private adjudication as binding on "those persons joined in the action and for the administration of such rights." I.C. § 42-1401A(9). Furthermore, with limited exceptions, I.C. § 42-1420 establishes that a "decree in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." Therefore, in the SRBA, water rights decreed in a prior adjudication are binding upon the parties (and their successors-in-interest) to that decree. Such parties bound by an earlier decree may not collaterally attack it in a later adjudication, such as the SRBA. The SRBA cannot serve as a second opportunity for parties and their successors-in-interest to re-adjudicate their prior decreed water rights. Subject to certain exceptions, the SRBA has consistently prohibited parties from reopening prior decrees.

The SRBA Court recently declined to allow a claimant to assert an earlier priority than had been determined in the prior *Lemhi Adjudication* (Dec. 30, 1982 – *Partial Decree*). The

SRBA Court reasoned that claims can vary from the elements in a prior decree to account for subsequent changes in circumstances such as abandonment, forfeiture, and accomplished transfer, or to correct errors. *Order of Recommitment to Special Master for Specific Findings* at 5 (Subcases 74-1080 and 74-15537) (Jan. 12, 2009). The SRBA Court explained that corrections are sometimes allowed to legal descriptions, which do not result in expanding the previously decreed right. However, the Court found that “evidence of an earlier use or larger quantity than previously decreed does not fit within either of the above exceptions and constitutes a collateral attack on the prior decree.” *Id.* The SRBA Court provided a succinct analysis which is applicable here:

The Court makes two observations in this respect. First, the fact that the present owner of a previously decreed water right may now have evidence of an earlier use or larger quantity than was previously decreed does not mean that an error or oversight occurred when the predecessor-in-interest filed (or failed to file) the claim in the prior adjudication. There are other plausible explanations. For instance, claims can be made in a manner so as to avoid contests. Existing differences between users over water rights can be worked out prior to the claims being filed so as to avoid litigation in the adjudication process. Settlements such as these may dictate what each user eventually claims in the adjudication. Therefore, parties or their successors-in-interest to the prior decree are entitled to rely upon the prior decree, at least to the extent that the scope of the right will not be expanded beyond what was previously adjudicated.

Id.

Thus, the District Court did not permit the claimant to relitigate the priority date established in the *Lemhi Adjudication*. The Movants’ argument is comparable. The Movants assert that this court cannot go behind the priority already determined by the *Rexburg Decree*. Given the facts asserted here, this Special Master agrees. Mr. Reid has an interesting argument about his predecessor’s Homestead Applications. However, to allow a claimant to reopen a prior decree to present evidence of earlier use than was previously decreed completely undermines the principles of *res judicata* and the Idaho Supreme Court’s ruling in *State v. Hagerman Water Right Owners*, as well as law-of-the-case in the SRBA. The determination of priority in the *Rexburg Decree* and the doctrine of *res judicata* dictate that the priority issue should not be reopened.

This court has also considered whether Mr. Reid could make a case under I.R.C.P. 60(a). I.R.C.P. 60(a) allows a court to correct clerical errors at any time. The Idaho Supreme Court also recently considered this issue in *Silsby v. Kepner*, 140 Idaho 410, 95 P.3d 28 (2004). In *Silsby*, the husband filed a petition to modify child support payments and a motion to correct a clerical error in the default divorce decree. The default divorce decree did not include an offset to the husband for the tax benefit to the wife of the child dependency exemption. The court entered a default judgment and decree which was based on wife's divorce complaint. Neither the complaint nor the default decree accounted for the tax benefits. The husband filed a motion under I.R.C.P. 60(a). The magistrate held that the failure to include the tax benefit offset was a clerical error, even though the divorce decree contained the same provisions the wife had requested in her petition. The Idaho Supreme Court reversed, holding that the magistrate had not intended to include the offset. The Court held that failure to include the offset was thus a legal error which could not come within I.R.C.P. 60(a).

The *Silsby* court described clerical errors which can be corrected under I.R.C.P. 60(a) as those in which the "type of mistake or omission [is] mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney." *Silsby* explained that motions under I.R.C.P. 60(a) "can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." *Id.* at 411.

Rulings in other jurisdictions distinguish clerical errors which can be corrected from legal errors which cannot be corrected under I.R.C.P. 60(a). In *Blanton v. Anzalone*, 813 F.2d 1574 (1987), the 9th circuit said:

The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Id. at n.2, (cited in *Silsby* at 412)

Mr. Reid may be arguing that the *Rexburg* court made a clerical error by assigning J.J. Miller's water right a priority date of 1904 instead of the date of his Homestead Application in

1901. While this Special Master recognizes that the SRBA Court has exercised some latitude in using I.R.C.P. 60(a) for correcting errors, it has not done so in the event of a contested matter on priority. Neither this court nor Mr. Reid knows why the *Rexburg* court decreed the priority date as 1904. If the decision that a 1904 priority date was proper was an error, it would be a legal error, not a clerical error. The decision would have been a legal error because there is nothing to indicate the court meant to decide a 1901 date but made a blunder in execution to write 1904. The error alleged is that the court should have considered the 1901 Homestead Application. That type of error would have been made due to a legal or factual mistake in its original decision. Consequently, the 1904 date cannot be corrected under I.R.C.P. 60(a). Accordingly, the Movants' *Motion for Summary Judgment* is **granted in part**.

C. Place of Use

The Movants argue that the place of use for these rights cannot be located on Mr. Reid's land. In support of that assertion, they submit the *Affidavit of Larry Kunz*. The *Affidavit* states that Mr. Reid's place of use was physically incapable of being irrigated from Paradise Springs by gravity flow irrigation. *Affidavit of Larry Kunz* at 2, ¶ 5-6. Mr. Reid did not submit an opposing affidavit. However, the *Director's Report* clearly considered topography when recommending Mr. Reid's place of use and concluded to the contrary. IDWR considered the *Rexburg Decree* and based its recommendation on 22-405. However, IDWR determined that the proper place of use was Mr. Reid's land. Thus IDWR concurred with the claim. The Remarks section asserts:

Decreed place of use appears to be an error; topography prevents water reaching place of use. Claimed place of use is part of actual original place of use.

Notice of Claim at 2 (22-13212). IDWR's recommendation agreed with that topographic assessment of the place of use.

On the one hand, the *Affidavit of Larry Kunz* asserts that Mr. Reid's place of use could not have been a valid location for irrigation out of Paradise Springs. The *Affidavit* states that the Reid land could not physically receive water from Paradise Springs by gravity irrigation because of its topography. That is contradicted by the *Director's Report* which considered the topography of the place of use in the *Rexburg Decree* and Mr. Reid's place of use.

The *Director's Reports* concluded that the two water rights derived from 22-405 should have Mr. Reid's place of use which is **different** than the place of use determined in the *Rexburg*

Decree. One reason for the conclusion is that IDWR agreed with the claimant's assertion that it was impossible to deliver water from Paradise Springs to the place of use decreed in the *Rexburg Decree*. Thus, the *Director's Report* is in accord with the remark section of the claim which concludes that the original place of use was incorrect. The Movants' affiant said that Mr. Reid's place of use is not valid because that land could not be irrigated from Paradise Springs. These opposing conclusions as to the hydrology and validity of the recommended place of use create a classic situation where genuine issues of material fact remain for trial. Summary Judgment as to the place of use is **denied**.

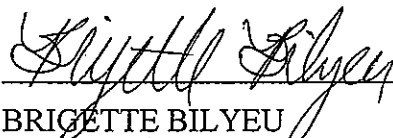
D. Conclusion

The Movants argued that Mr. Reid cannot claim a portion of 22-405 as a matter of law. The court agrees that I.C. § 42-1427 is not a mechanism for correcting elements previously decreed for water rights. Because it is plausible that a valid accomplished transfer occurred, however, the Movants' *Motion for Summary Judgment* is **denied in part**.

Mr. Reid argued that the priority of 1904 decreed in the *Rexburg Decree* is wrong because certain homesteading documents could have supported an earlier date of 1901. The court considered this argument, but held that the error alleged would be a legal error, not a clerical error, and thus cannot be corrected under I.R.C.P. 60(a). Additionally, the court considered the principles of *res judicata* and the law-of-the-case and determined that the priority date established in the *Rexburg Decree* would not be reopened here. Accordingly, Mr. Reid's *Motion for Summary Judgment* is **denied in part** and the Movants' *Motion for Summary Judgment* is **granted in part**.

Finally, both Mr. Reid and the Movants moved for summary judgment on the place of use. The court concluded that the Movants and Mr. Reid rely on opposing conclusions as to the hydrology and validity of the place of use, leaving "genuine issues of material fact" to be determined at trial. Consequently the Movants' and Mr. Reid's *Motions for Summary Judgment* are **denied**.

Dated: September 21, 2009.


BRIGETTE BILYEU
Special Master
Snake River Basin

CERTIFICATE OF MAILING

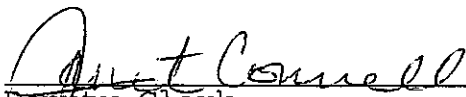
I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on September 21, 2009, with sufficient first-class postage to the following:

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