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September 23, 2009

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Re: Subcase Nos. 22-13212 and 22-13503

Dear Clerk:

Attached for filing please find *Objectors' Trial Brief*. Thank you for your assistance.

Sincerely,


THOMAS J. BUDGE

TJB:rr
Attachment
cc: Mike Reid

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DEPARTMENT OF
WATER RESOURCES

*Attorneys for Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc.,
Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr.*

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

Case No. 39576

Subcase Nos. 22-13212, 22-13503

OBJECTORS' TRIAL BRIEF

Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc., Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr. (collectively, the "Objectors") submit this *Objectors' Trial Brief* pursuant the Court's *Trial Scheduling Order* dated February 2, 2009.

SUMMARY OF POSITION

The Claimant's request for a 1904 priority under water right numbers 22-13212 and 22-13503 should be denied because the Claimant's property was not irrigated until 1969, and there is no competent evidence of a legitimate transfer of an earlier-priority water right to the Claimant's property in 1969. SRBA Claim Numbers 22-13212 and 13503 duplicate water right number 22-11639 which was properly claimed, recommended, and decreed by the SRBA Court.

STATEMENT OF THE CASE

A. Procedural History.

Water right numbers 22-13212 and 22-13503 were claimed in the SRBA by the Claimant, Michael Reid ("Reid"). A Partial Decree was issued for water right number 22-13503 on

November 24, 2008. The Objectors filed *Motion to Set Aside Partial Decree and to Allow the Filing of a Late Objection* to water right number 22-13503, which was granted. The Objectors filed timely objections to water right number 22-13212.

Reid and the Objectors moved for summary judgment in both cases. Reid asserted that: (1) water rights 22-13503 and 22-13212 are offspring of water right 22-405 which was decreed in the case of ___ with a priority date of June 1, 1904 (*Mot. for Summ. J.* 1-3); (2) water right numbers 22-13503 and 22-13212 should be given a priority date of May 23, 1901, rather than the 1904 priority date decreed to water right number 22-405 (*Id.* at 3); and (3) his property came under irrigation by means of a transfer of water right 22-405 from north of Paradise Springs to his property (*Id.* at 4).

The Objectors asserted that: (a) Idaho Code § 42-1427 (the “ambiguous decree statute”) does not apply to water rights 22-13503 and 22-13212 (*Obj. Resp. to Claimant’s Mot. for Summ. J.* 6-8); (b) undisputed evidence entitles Reid to a water right priority no earlier than July 21, 1969 (*Id.* at 8-9); (c) there is no competent evidence that Reid’s property was brought under irrigation by an accomplished transfer of water right 22-405; (d) the combined diversion rate of water right numbers 22-13503 and 22-13212 should not exceed 0.59 cubic feet per second (cfs) (*Id.* at 11-12); and (e) Reid’s request for a 1904 priority date is barred by the doctrine of *res judicata* (*Id.* at 12).

The Court agreed that Reid’s claim to a 1904 priority date is indeed barred by the doctrine of *res judicata*. (*Ord. on Summ. J.* 11.) The Court agreed “that I.C. § 42-1427 is not a mechanism for correcting elements previously decreed for water rights,” but refused to rule on the question of whether water rights 22-13503 and 22-13212 are offspring of water right 22-405 “[b]ecause it is plausible that a valid accomplished transfer occurred.” (*Id.* at 11.)

B. Issues Remaining for Trial.

In consequence of the Court’s *Order on Summary Judgment*, there are two remaining issues for trial. First, whether Reid’s property came under irrigation by means of an accomplished transfer of water right 22-405. *Id.* Second, whether Reid’s property was irrigated by gravity flow prior to the installation of an electric pump in 1969. *Id.*

C. Legal Standard.

In the SRBA, the claimant has the ultimate burden of persuasion for each element of the claimed water right. Idaho Code § 42-1411(5). Normally, the Director’s Report constitutes

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prima facie evidence of the nature and extent of water rights. *Id.* However, the Director's Report cannot be given *prima facie* weight if the Report is based upon misinterpretation or misapplication of Idaho law.

On summary judgment, the Objectors argued that the IDWR erred by basing its water right recommendation for water rights 22-13503 and 22-13212 upon the "ambiguous decree" statute (Idaho Code § 42-1427). The Court agreed that the ambiguous decree statute does not properly apply to these water rights, but found that the IDWR may have based its recommendation on evidence of an accomplished transfer pursuant to Idaho Code § 42-1425. (*Ord. on Summ. J.* 6-7.) Evidence at trial will show that the IDWR did not base its recommendation on evidence of an accomplished transfer, but instead relied solely on the ambiguous decree statute. Consequently, the Director's Report should not be treated as *prima facie* evidence of an accomplished transfer of water right 22-405 to Reid's property. Rather, Reid must be required to come forth with evidence to independently prove a legitimate accomplished transfer of water right number 22-405 to his property.

If the Director's Report were not based in misapplication of Idaho Code § 42-1427, "the 'prima facie' status accorded to the Director's Report in *I.C. Section 42-1411(4)* constitute[s] a rebuttable evidentiary presumption." *In re SRBA Case No. 39576*, 130 Idaho 736, 745 (1997) (citing *In Re SRBA Case No. 39756*, 128 Idaho 246, 255-56 (1995)). The presumption "shifts only the burden of production. When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Id.* In other words, the facts contained in the Director's Report "are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption." *Id.* at 746.

D. Statement of Facts.

SRBA claim numbers 22-13212 and 22-13503 are claimed appurtenant to 35.6 acres owned by the Reid near Victor, Idaho, for irrigation purposes from Paradise Springs. Reid purchased the property in 1999. At that time, there were no licensed or decreed water rights appurtenant to the property. The records of the Idaho Department of Water Resources ("IDWR") showed nothing more than a "statutory claim" with a priority date of July 21, 1969, filed in 1983 by Reid's predecessor in interest, LeRoy Miller.

Reid has already been decreed a water right with a priority date of July 21, 1969 (Water Right 22-11639) for the same property. Notwithstanding, Reid filed SRBA claims 22-13212 and

22-13503 seeking to improve his water rights from Paradise Springs by claiming a priority date of June 1, 1904, for his property.

Reid's property was the very last to come under irrigation from Paradise Springs, in 1969. Accordingly, Reid's neighbors have always understood and treated Reid's water right as last in priority on Paradise Springs, and they are understandably upset by Reid's attempt to leapfrog their water right priorities and put himself in a position to make delivery calls against their rights which were legitimately appropriated before Reid's property was ever irrigated.

Reid does not dispute that his property was not irrigated until 1969, but he apparently thinks he should be given a 1904 priority date anyway because his land is located within the homestead of J.J. Miller to whom was decreed water right 22-405 with a priority date of June 1, 1904, in the "Rexburg Decree." Importantly, the decreed place of use of water right 22-405 does not include Reid's property. Consequently, for Reid to establish a portion of water right 22-405, he must prove an accomplished transfer of that right.

The truth is, water rights 22-13212 and 22-13503 duplicate water right 22-11639 which was properly claimed, recommended, and decreed for Reid's property with a priority date of July 21, 1969, and a diversion rate of 0.59 cfs. Accordingly, SRBA claim numbers 22-13212 and 22-13503 should be denied.

ARGUMENT

Reid's claim to a portion of water right 22-405 is not supported by either the history of water right 22-405 or the history of irrigation of Reid's property. Evidence to be presented at trial will show, first, that Reid's property was not irrigated until 1969; second, that there was no legitimate transfer of water right 22-405 to Reid's property in 1969; and, third, that the rate of diversion claimed under water rights 22-13212 and 22-13503 exceeds the quantity actually appropriated in 1969.

I. Reid's property was first irrigated in 1969.

In 1983, Reid's predecessor in interest, LeRoy Miller, filed a Claim to a Water Right with the IDWR, claiming a priority date of July 21, 1969. LeRoy's claim will be corroborated by electric records from Fall River Electric Company, as well as by testimony from Larry Kunz who farmed LeRoy Miller's property in 1969 and helped install the pump that year. IDWR records will further confirm that Reid's property was not irrigated until 1969.

The Objectors expect Reid to solicit testimony that his property was irrigated long before 1969. Reid has presented various accounts of pre-1969 irrigation of his property to the IDWR and to this Court. However, the evidence will show these accounts to be contradictory. The most credible evidence will confirm that irrigation of Reid's property did not occur until 1969.

Nevertheless, in an effort to push his priority date earlier, Reid argues that LeRoy Miller did not make a new appropriation in 1969, but that he at that time acquired a portion of water right number 22-405, decreed in the 1910 Rexburg Decree. As explained above, Reid's property is not located within the decreed place of use of water right number 22-405, and there has never been a formal transfer of the right to the Claimant's property. For the Claimant to have any part of water right number 22-405, he must prove an accomplished transfer of the right, of which there is no competent evidence, as explained below. Further, even if water right number 22-405 were somehow deemed appurtenant to the Claimant's property as of 1910, the right was forfeited by non-use long before the Claimant's property came under irrigation in 1969.¹

II. There is no competent evidence of a transfer of water right number 22-405 to Reid's property, but even if there were, the priority date would have to be pushed back to 1969 to protect against injury to the Objectors.

Idaho Code § 42-108 allows the elements of a water right to be changed so long as "the water rights of others are not injured by such change" and the water user complies with the requirements of Idaho Code § 42-222. Where an element of a water right was changed prior to the SRBA, but without complying with the requirements of Idaho Code §§ 42-108 and 42-222, the claimant is allowed to claim the change under Idaho Code § 42-1425 (the "accomplished transfer" statute) "provided no other water rights are injured thereby, [and] the change does not constitute an enlargement in use of the original right."² "[C]laimants asserting their claims of 'changed' use bear the ultimate burden of persuasion to prove no injury and no enlargement." *Basin-Wide Issue 4*, at 43.6.

¹ A water right is forfeited by "a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated." Idaho Code § 42-222(2). A water can be forfeited in whole or in part due to non-use. *In re SRBA, Case Nos 39576, 91-00010 Ex Rel, Partial Forfeiture Re; Basin-Wide Issue 10*, 130 Idaho 727, 733-735 (1997) (partial forfeiture recognized).

² The requirement that a transfer not injure other water users existed when the Claimant's property first came under irrigation in 1969. *See*, 1945 Idaho Sess. Laws, ch. 63, § 1, p.81 ("provided no one shall be injured by the transfer").

The requirement that a transfer not constitute an enlargement means that the transfer cannot “increase the burden on the stream or reduce the volume of water available to other water users.” *Basin-Wide Issue 4*, n.4, at 43.6. This means that an accomplished change of the place of use cannot occur without evidence that previously-irrigated acres were dried up. For each acre that is newly irrigated as a result of the change, an acre that was previously irrigated must be dried up.

Reid argued on summary judgment that the irrigation of his property in 1969 was facilitated by a transfer of water right 22-405. However, the Objectors expect Reid will be able to provide no reliable evidence of land dried up within five years before his property was irrigated. Evidence will show that the decreed place of use of water right 22-405 has never been irrigated from Paradise Springs, and that it would have been impossible before the time when hydraulic pumps became technologically and economically feasible since the decreed place of use of 22-405 is located up-gradient from Paradise Springs.

Notably, LeRoy Miller says nothing of a transfer in the water right claim he filed in 1983. Thus, Reid’s allegation that a transfer occurred in 1969 requires the Court to assume that LeRoy Miller did not know that a transfer had occurred, or that he did not believe it was important to claim the priority date of the water right being transferred. The reality is that there were more acres coming under irrigation from Paradise Springs in the late 1960s as farmers in the neighborhood began installing sprinkler lines.

Moreover, even if there was a legitimate basis to claim accomplished transfer, Reid’s priority date would have to be advanced to July 21, 1969, to prevent injury to the Objectors, since an accomplished transfer is allowed only if “no other water rights existing on the date of the change were injured.” Idaho Code § 42-1425. Even if, as Reid claims, his property was irrigated because other land became too wet to run heavy equipment, there is no evidence that the other land was actually dried up.

It is no secret that Reid has worked very hard to have the Objectors’ water rights curtailed, claiming that they impact flows from Paradise Springs. But the reality is that irrigation of Reid’s property increased the demand on Paradise Springs and increased level of water consumption from the Springs. Had his property not come under irrigation, there would be less demand on the spring and less consumption, resulting in increased recharge to the local aquifer.

Evidence will show that LeRoy Miller did not transfer water from elsewhere onto the Claimant's property, but that he made a new appropriation in 1969. Irrigation of the Claimant's property in 1969 created a new demand on Paradise Springs that did not previously exist. It reduced the volume of water available to other water users, and therefore constitutes a new appropriation that should be awarded a priority date of July 21, 1969.

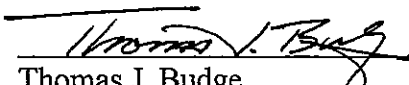
CONCLUSION

The facts of this case will show that Reid's predecessor in interest, LeRoy Miller, made a new appropriation in 1969, not a valid transfer of an earlier-priority water right from other ground. SRBA claims 22-13212 and 22-13503 are duplicative of claim number 22-11639 which is based on LeRoy Miller's 1969 appropriation, and they should therefore be denied. To award an earlier priority date would be an affront to the fundamental principle that water rights are acquired by actual water use, not theoretical water use.

RESPECTFULLY SUBMITTED.

DATED this 23rd day of September, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

*Attorneys for Cedron Irrigation, LLC, Teton
Rainbow Ranches, Inc., Trees, Inc., Mahogany
Ranch Holdings, and Wally Rothgeb, Jr.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2009, the above and foregoing document was served in the following manner:

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