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NOV 02 2009

DEPARTMENT OF
WATER RESOURCES

Randall C. Budge, ISB No. 1949
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
Post Office Box 1391
201 E. Center Street
Pocatello, Idaho 83204-1391
208-232-6101 - Telephone
208-232-6109 - Fax

*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' POST-TRIAL BRIEF

Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc., Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr. (collectively, the "Objectors") submit this *Objectors' Post-Trial Brief* per the Court's instruction given orally on October 8, 2009, at the conclusion of trial.

SUMMARY OF POSITION

The Claimant's request for a 1904 priority date under water right numbers 22-13212 and 22-13503 should be denied because the Claimant's property was not irrigated until 1969, and because there is no competent evidence of a legitimate transfer of an earlier-priority water right to the Claimant's property in 1969. Water rights 22-13212 and 22-13503 duplicate water right 22-11639 which was properly claimed in the Snake River Basin Adjudication ("SRBA"), recommended by the Idaho Department of Water Resources ("IDWR"), and decreed to Michael Reid (the Claimant in these subcases) by the SRBA Court.

STATEMENT OF THE CASE

A. Procedural History.

Water rights 22-13212 and 22-13503 are claimed in the SRBA by Michael Reid. A Partial Decree was issued for water right number 22-13503 on November 24, 2008. The Objectors filed a *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.

The Claimant and the Objectors moved for summary judgment in both cases. The Claimant asserted that: (1) water rights 22-13503 and 22-13212 are offspring of water right 22-405 which was decreed in the 1910 Rexburg Decree 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 properly apply to water rights 22-13503 and 22-13212 (*Obj. Resp. to Claimant's Mot. for Summ. J.* 6-8); (b) undisputed evidence entitles the Claimant to a water right priority no earlier than July 21, 1969 (*Id.* at 8-9); (c) there is no competent evidence that the Claimant'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) the Claimant's request for a 1904 priority date is barred by the doctrine of *res judicata* (*Id.* at 12).

The Court ruled on summary judgment that the Claimant's request for a 1901 priority date is indeed barred by the doctrine of *res judicata*. (*Ord. on Summ. J.* 11.) The Court further ruled "that I.C. § 42-1427 is not a mechanism for correcting elements previously decreed for water rights," but the Court 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.)

Following the Court's summary judgment decision, the Idaho Department of Water Resources ("IDWR") re-evaluated the Director's Reports for water rights 22-13503 and 22-13212, and issued Amended Director's Reports for those water rights. The Amended Director's

Report for water right 22-13503 recommended that it be disallowed. (IDWR Ex. 19.) The Amended Director's Report for water right 22-13212 recommended a June 1, 1904, priority date for 5.3 acres within a permissible place of use of 35.6 acres. (IDWR Ex. 12.) The Court ruled at trial that the Amended Director's Reports be given *prima facie* weight, rather than the original Director's Reports for water rights 22-13503 and 22-13212.

Both the Claimant and the Objectors objected to the Amended Director's Reports. The Claimant asserts that his entire 35.6 acres should be given a water right with a priority date of June 1, 1904. The Objectors assert that none of the Claimant's property was irrigated prior to July 21, 1969; that there is no reliable evidence of a transfer of water right 22-405 to the Claimant's property within five years of 1969; and that water right 22-13503 and 22-13212 should be disallowed because they duplicate the Claimant's water right 22-11639 which was properly claimed, recommended and decreed by the SRBA Court with a 1969 priority date.

B. Issues at Trial.

In consequence of the Court's *Order on Summary Judgment*, there are only two factual issues at bar. First, when did the Claimant's property first come under irrigation? Second, did the Claimant's property come under irrigation by means of a new appropriation, or by an accomplished transfer of Water Right 22-405?

C. Legal Standard.

In the SRBA, "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right." Idaho Code § 42-1411(5). The Director's Report is *prima facie* evidence of the nature and extent of water rights, and as such "constitute[s] a rebuttable evidentiary presumption." *State v. Hagerman Water Right Owners (In re SRBA Case No. 39576)*, 130 Idaho 736, 745 (1997). Evidentiary presumptions in civil actions are governed by Idaho Rule of Evidence 301, which states that

a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

See id. at 745. "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Id.* Idaho Code § 42-1411 "makes clear that the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right." *Id.* at 742.

D. Statement of Facts.

The Claimant purchased his property in 1999. (Reid testimony.) At that time, there were no licensed or decreed water rights appurtenant to the property. (Holliday testimony.) The records of the IDWR showed only a claim to a water right ("243 Claim"¹) filed in 1983 by the Claimant's predecessor in interest, LeRoy Miller (a/k/a Roy Miller). (Ex. C-3.)

Roy Miller filed two 243 Claims in the year 1983, both of which were admitted into evidence as Exhibits C-1 and C-3. Exhibit C-1 claims a water right for 8 acres on property located north of the Claimant's property, and states that water was first applied to beneficial use thereon on June 1, 1904. Exhibit C-3 claims a water right appurtenant to the Claimant's property, and states that water was first applied to beneficial use thereon on July 21, 1969.

Roy Miller's son, Don Miller, testified that water rights were an important topic of discussion in his family, and that he helped his father prepare the 243 Claims identified as Exhibits C-1 and C-3. Don Miller recalled the Swan Falls dispute and the deadline that the legislature set for filing Water Right Claims under Idaho Code §42-243.² He testified that his father recognized that it was important to evidence their water rights at that time, which he did by filing Exhibits C-1 and C-3. Don Miller and Michael Holliday both testified that they know of no other 243 Claims filed by Roy Miller or anyone else relating to the Claimant's property.

Consistent with Exhibit C-3, the Claimant filed a claim in the SRBA for water right 22-11639 with a priority date of July 21, 1969. The IDWR recommended that water right 22-11639 be decreed as claimed. No water users objected to this recommendation, and water right 22-11639 has been partially decreed by the SRBA court with a priority date of July 21, 1969, for the irrigation of the same 35.6 acres claimed under water rights 22-13212 and 22-13503.

In addition water right 22-11639, and notwithstanding Roy Miller's statement under oath in Exhibit C-3 that the Claimant's property was first irrigated in 1969, the Claimant filed SRBA claims to water rights 22-13212 and 22-13503 with priority dates of June 1, 1904. In addition to claiming an earlier priority date, water rights 22-13212 and 22-13503 collectively claim a greater quantity of water than Roy Miller states was actually diverted in 1969. The Claimant alleges that

¹ Claims to water rights established by diversion and beneficial use without a permit, license or decree are commonly referred to as "243 Claims" because the filing of such claims is authorized by Idaho Code § 42-243.

² At that time, Idaho Code §42-243(h) required any water right for which a claim was not filed by June 30, 1983, would be relinquished. 1978 Idaho Sess. Laws, ch. 345, § 6, p.884; 1983 Idaho Sess. Laws, ch. 61, § 1, p. 141.

his property came under irrigation in 1969 by use of water right 22-405 which was decreed in the 1910 Rexburg Decree with a priority date of June 1, 1904.

The IDWR recommended that water right 22-13503 be disallowed because it was physically impossible to irrigate most of the Claimant's property by gravity flow from Paradise Springs, which was the only available means of irrigation up until Roy Miller installed a pump in the year 1969. (Holliday Testimony.) The IDWR recommended a 1904 priority date for 5.3 acres under water right 22-13212 on the basis that it was *theoretically possible* to irrigate up to 5.3 acres by gravity flow. *Id.* Michael Holliday testified unequivocally that the IDWR had no evidence of actual irrigation of any of the Claimant's property prior to 1969.

IDWR Exhibit 14 depicts the recommended place of use of water right 22-13212 and its point of diversion from Paradise Springs. Water is diverted from the head of Paradise Springs into a ditch (referred to at trial as the "south ditch") that runs in an easterly direction to a grove of trees surrounding a home owned by Don Miller. Exhibit R-28 is a recent photo of the south ditch. After the ditch reaches the trees, it runs inside the grove of trees along the south of the Don Miller home until it reaches the road. Exhibit C-30 is an aerial photograph taken in the year 1960 by the United States Department of Agriculture that shows the south ditch in the same location in 1960 as it is today. Don Miller testified that the south ditch has been in the same place for as long as he can remember, except for some minor modification at the east end of the ditch when his father installed an electric pump in the year 1969. Importantly, Michael Holliday inspected the full length of the south ditch shortly before the trial, and noted that "all of [the south ditch] was located north of the Reid property." (IDWR Ex. 15.)

Since the most or all of the Claimant's property is located up-gradient from the south ditch, and therefore incapable of irrigation by gravity-flow, Roy Miller installed an electric pump and sprinkler line in the year 1969 to enable irrigation of that land. Exhibit C-25 includes an "Agreement for the Purchase of Power" between Fall River Electric and Roy Miller dated June 2, 1969. Exhibit C-25 also includes a service job order showing that a meter was installed on a 15 horse power electric pump for Roy Miller on July 21, 1969. Don Miller testified that these documents refer to the electric pump that his father Roy installed in the year 1969 to irrigate lands located up-gradient from the south ditch. During Michael Holliday's inspection of the south ditch, he found the 15 horse power pump, which is still used today to irrigate the Claimant's property. (IDWR Ex. 15.)

Larry Kunz, who has lived in Victor his whole life and farmed in the Paradise Springs area for the last 40 years, is familiar with the Claimant's property and recalls it coming under irrigation for the first time in 1969. Larry Kunz in fact farmed the Claimant's property for Roy Miller that year, and recalls helping Roy Miller install the irrigation pump and sprinkler line. Larry Kunz gave detailed testimony about installing the pump and irrigating the property. He testified that Roy had a single irrigation line at the time. The base of the line was fixed at the pump, and the distal end of the line was rotated by degrees to irrigate as much of the Claimant's property as possible. Larry Kunz testified that there were no irrigation ditches anywhere on the Claimant's property when he farmed it in 1969, and that the property was a dry farm prior to the installation of the pump and sprinklers in 1969.

Todd Dustin also recalled the Claimant's property being a dry farm before Roy Miller installed a pump in 1969. He testified that he helped his father cut and harvest hay off the Claimant's property as a young boy in the year 1968. Roy Miller was a carpenter and helped Todd's family build a barn that year. In return, Todd's father agreed to use his new farm equipment to harvest and bail the hay Roy had raised on the Claimant's property. Todd recalled riding on his father's new tractor while harvesting Roy's hay. Todd also recalled the Claimant's property being a dry farm at the time. He did not recall any ditches or flood irrigation of any part of the Claimant's property at that time.

Exhibit C-30 is an aerial photograph of the Claimant's property taken by the United States Department of Agriculture in the year 1960. Michael Holliday—who was qualified as an expert in recommending water rights in the SRBA, which regularly includes review of aerial photography—testified that he was unable to identify any irrigation ditches on the Claimant's property in the photo, and that based on the picture in his opinion there was no flood irrigation of the Claimant's property as of 1960.

Consistent with the electric records in Exhibit C-25, the testimony of Larry Kunz, the testimony of Todd Dustin, and the aerial photograph in Exhibit C-30, Roy Miller states under oath in Exhibit C-3 that the property now owned by the Claimant was first irrigated July 21, 1969. Roy Miller's son, Don Miller, testified that Roy Miller not only owned the Claimant's property in 1969, but that he had owned the Claimant's property for more than a quarter century prior to 1969, having acquired the Claimant's property in the year 1941.

ARGUMENT

The evidence at trial overwhelmingly showed that the Claimant's property was first irrigated in 1969. In contrast, the Claimant offered essentially no evidence to prove that his property came under irrigation in 1969 by means of an accomplished transfer of water right 22-405. History simply does not support the Claimant's claim to a portion of water right 22-405. If the SRBA is to decree water rights based on actual water use (rather than theoretical water use), then water rights 22-13212 and 22-13503 must both be disallowed as duplicative of water right 22-11639 which was properly claimed, recommended, and decreed to the Claimant's property with a priority date of July 21, 1969.

I. There is no substantial evidence that any portion of the Claimant's property was irrigated prior to July 21, 1969.

As explained below, the evidence clearly shows that the IDWR's recommendation of water right 22-13212 with a 1904 priority date for 5.3 acres is based upon the mere theoretical possibility of irrigation in 1904, rather than upon evidence of actual irrigation. Moreover, the IDWR agreed that the 5.3 acre figure was based on assumptions that do not exist in reality, and that the number of acres that even possibly could have been irrigated is something less than 5.3. Most importantly, however, there is no substantial evidence of actual irrigation of *any* of the Claimant's property prior to 1969.

A. The Amended Director's Report for water right 22-13212 is not based on any evidence of actual water use; only on the *theoretical possibility* of water use.

Under Idaho law, water rights are created by actual water use, not theoretical water use. It is not enough to want to use water, to think about using water, to be capable of using water, or even to begin preparing to use water. Unless and until water is actually put to beneficial use, there is no water right. Indeed, it is a "constitutional requirement that priority over water be extended only to those using the water." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 876 (2007). This is why, in the SRBA, the IDWR is required to undertake "an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system." Idaho Code § 42-1410 (emphasis added). The IDWR Director's Report is supposed to be based on evidence of actual water use, not on the theoretical possibility of water use.

The Amended Director' Report for water right 22-13212 recommends a water right for 5.3 acres with a 1904 priority date. (IDWR Ex. 12.) However, Michael Holliday testified that the IDWR has no evidence of actual water use on any of Reid's property prior to 1969. He testified that the Director's Report was based solely on the theoretical possibility of flood irrigation of 5.3 acres of Mr. Reid's property before sprinklers were installed in 1969.

Since the Amended Director's Report for water right 22-13212 is based on the mere theoretical possibility of water use, rather than actual water use, it must be given little, if any, *prima facie* weight. Indeed, if recommendations based simply on what is theoretically possible were given *prima facie* weight, it would place objectors in the impossible position of having to prove that water use is theoretically impossible in order to rebut the Director's Report, rather than simply putting on evidence that water use did not occur in fact. This is why Director's Reports must be based on actual water, and why the Amended Director's Report for water right 22-13212 cannot be granted *prima facie* weight.

B. The Amended Director's Report overstates the number of acres that even possible could have been irrigated prior to 1969.

The IDWR recommended 5.3 acres with a 1904 priority on the basis that it would have been impossible to irrigate more than 5.3 acres within the Claimant's property in 1904. (Holliday testimony.) In 1904, gravity-flow was the only means of irrigation from Paradise Springs. *Id.* As a result, Mr. Holliday utilized a topographic map (IDWR Ex. 16) to try and determine how many acres within the Claimant's property could have theoretically been irrigated by gravity flow. *Id.* Using the elevation contour line nearest Paradise Spring, Mr. Holliday calculated the total number of acres down gradient from that elevation line, which totaled 5.3 acres. *Id.* This is depicted on IDWR Exhibit 17.

However, IDWR Exhibit 17 shows that the diversion from Paradise Spring is located *below* the contour line that Mr. Holliday used to calculate the total number of acres that are theoretically capable of being flood irrigated. IDWR Exhibit 16 shows that each contour line represents 20 feet in elevation; therefore, the Claimant's point of diversion is actually located somewhere between 1 foot and 19 feet below the contour line that Mr. Holliday used to calculate the total number of acres that could theoretically be irrigated.

Exhibit R-28 indicates that the Claimant's point of diversion is substantially lower than the contour line used by Mr. Holliday. Exhibit R-28 is a photograph of the Paradise Spring and

the south ditch. It shows the slope of the land surrounding Paradise Spring to the south and west at a much steeper grade than slope of the land located north and east of Paradise Spring. Since the contour line used by Mr. Holliday is located west of Paradise Spring (where there is a steep slope), it is likely that the point of diversion from Paradise Spring is substantially lower than the contour line.

Moreover, Mr. Holliday testified that his calculation of the number of acres that could have theoretically been flood irrigated assumes that the south ditch follows the contour line exactly. Mr. Holliday testified that would be unusual because irrigation ditches typically have a degree of "fall" in elevation to enable water to flow through the ditch. Don Miller confirmed that the south ditch (and the point of diversion from Paradise Spring) has been in the same location for as long as he can remember (since 1941), and that water does in fact flow through the south ditch (i.e. the ditch does not follow the contour line exactly). The existence of fall in the "south ditch" further minimizes the number of acres that could have possibly been irrigated on the Claimant's property by gravity flow.

The fact that the Claimant's point of diversion is located below the contour line used by Mr. Holliday, together with the fact that water flows downhill in the south ditch, makes it likely that little if any of the Claimant's property could have been irrigated prior to the installation of a pump and sprinklers in 1969. Indeed, after considering this evidence, Mr. Holliday agreed that the total number of acres that could possibly have been irrigated is less than 5.3.

C. Even if some of the Claimant's property could have been irrigated prior to 1969, there is no evidence of actual irrigation.

Most importantly, the Claimant failed to put on any evidence of actual irrigation of his property prior to when Roy Miller installed a pump in 1969.

Mr. Holliday confirmed that the IDWR has no evidence of irrigation of any of the Claimant's property prior to 1969. Mr. Holliday further testified that he performed a field exam of the Claimant's property, looking for evidence of irrigation ditches leading to the Claimant's property. (IDWR Ex. 15). He found what may have been the remnants of a ditch running north from Paradise Springs, but he found no evidence of ditches running south towards the Claimant's property other than the south ditch. *Id.* He testified that the south ditch is located north of the Claimant's property, that the current location of the "south ditch" would not allow irrigation of

Reid's property, and that there is no other evidence in the IDWR's records of flood irrigation of Reid's property prior to 1969. (Holliday testimony.)

The Claimant has argued before that a diesel pump owned by Chet Miller (a brother to Roy Miller) was used to irrigate Roy Miller's property from 1963 to 1969. (*Mot. to Set Aside Partial Decree and Allow the Filing of a Late Objection*, SRBA Subcase 22-11639 (Feb. 20, 2009)). The Claimant asserted:

The truth is, that beginning in the late 1950's, a tractor pump was used to irrigation much of the original JJ miller homestead. In 1963 a permanent electrical pump was installed to irrigate the north half of that homestead, leaving the tractor pump to run as necessary on Don's and my properties.

Id. However, the evidence presented at trial proved otherwise. Exhibit C-25 includes records from Fall River Electric showing that an electric pump was not installed by Chet Miller until 1971 (not 1963 as the Claimant argues). Chet Miller's son, Rex Miller, testified that these records pertain to his father's pump, and that installation of the pump in 1971 is consistent with his recollection. Furthermore, Chet Miller testified that his family's pump was never used to irrigate Roy's property. Thus, as with the Claimant's other efforts to prove water use before 1969, the theory that Chet Miller's pump was used to irrigate the Claimant's property is made-up.

The Claimant has also attempted to argue that the northeast corner of his property was flood-irrigated prior to 1969. This theory also lacks evidentiary support, the Claimant having offered nothing more than contrived speculation to support the theory. Don Miller testified that there are some willows located along the road south of his home, and opined that there may have at one time been an irrigation ditch out south of the "south ditch" to irrigate those willows. His testimony on this point was pure speculation.

Don Miller did not testify that he dug or maintained a ditch, that he personally irrigated the northeast corner of the Claimant's property, or that his family even raised crops on the northeast corner of the Claimant's property. In contrast, Don Miller gave quite specific testimony about the south ditch, the poplar at the end of the south ditch, and modification of the south ditch when the pump was installed in 1969.

Don Miller grew up right next to the northeast corner of the Claimant's property. Had there been irrigation ditches and cultivation on the northeast corner of the Claimant's property, Don Miller certainly would have remembered it and been able to explain it in clear terms and with conviction. Instead, he provided vague and speculative testimony that a ditch may have at

one time led to some willows south of his home. Critically, however, when Don Miller was pressed on his personal knowledge, he could say only that he recalled flood irrigation of the trees on the south side of his home. Exhibit C-30, when compared with IDWR Exhibit 18, shows that these trees are all located north of the Claimant's property.

Moreover, Larry Kunz and Todd Dustin both farmed the Claimant's property in the late sixties and testified there were no irrigation ditches on the property. Michael Holliday searched the property for remnants of an irrigation ditch and found none. (IDWR Ex. 15.) In addition, Michael Holliday carefully reviewed Exhibit C-30—the aerial photo of the Claimant's property taken in 1960. While the photo clearly shows the south ditch from the top of Paradise Springs to the Don Miller home, Mr. Holliday testified (as an expert in recommending water rights, which regularly requires review of historic overhead photographs) that there is no evidence of any ditches across the Claimant's property. Since ditches would have been necessary for flood irrigation, Mr. Holliday testified that Exhibit C-30 indicates that there was no flood irrigation of the Claimant's property as of 1960.

Finally, there would be no need to irrigate the northeast corner of the Claimant's property because it is naturally marshy and not susceptible to cultivation. Larry Kunz drives along the east edge of the Claimant's property multiple times a day and has done so for decades. He testified that the northeast corner of the Claimant's property contains broadleaf plants that are typical of wetland areas not suitable for farming. As an expert on farming practices in the Paradise Springs area, Larry Kunz testified that in his opinion the northeast corner of the Claimant's property has never been farmed because its marshy condition makes it unsuitable for cultivation.

Todd Dustin also drives by the Claimant's property multiple times each day and has never seen that property farmed due to its natural marshy state. Mr. Holliday likewise testified that during his recent site inspection of the Claimant's property, he noted that the northeast corner is marshy. He also testified that Exhibit C-30 shows darker vegetation in the northeast corner of the Claimant's property which indicates it was marshy when that photo was taken in 1960. Critically, the Claimant himself testified that the northeast corner of his property contains "auxiliary springs" which not only explains why the area is marshy, but also explains why willows may have been growing in the area.

In sum, there is not only a lack of evidence that the northeast corner of the Claimant's property was flood irrigated, but there would be no reason to irrigate that property because it is naturally wet and marshy. Were that property farmable, it no doubt would have always been farmed and would still be farmed today. But it isn't, which is why that area is excluded from the place of use of water right 22-13212 as shown on IDWR Exhibit 14.

II. There is no competent evidence of a transfer of water right 22-405 to the Claimant'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."³ "[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.

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.

In this case, the Claimant 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." However, the decreed place of use of water right 22-405 does not include the Claimant's property. IDWR Exhibit 14 depicts the land to which Water Right 22-405 was decreed, which is located roughly three-quarters of a mile

³ 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").

south of the Claimant's property. Moreover, Michael Holliday, Craig Kunz, and Reid all testified 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 to irrigate that property by flood irrigation from Paradise Springs due to its location up gradient from Paradise Springs. Consequently, for the Claimant to prove ownership of any portion of water right 22-405, he must prove an accomplished transfer of that right to his property.

Since the Rexburg Decree was entered in 1910, Water Right 22-405 was forfeited pursuant to Idaho Code § 42-222 to the extent it was not beneficially used by 1915. Specifically, Idaho Code § 42-222(2) reads:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter.

As explained above, it would have been impossible to use water right 22-405 on its decreed place at the time of the Rexburg Decree. Therefore, since the decreed place of use of water 22-405 could not be irrigated, water right 22-405 was forfeited to the extent it was not transferred and beneficially used on other land by 1915.

The Claimant offered no evidence that water right 22-405 was transferred to his property within five years after 1910. In fact, the only evidence that any portion of water right 22-405 may have been transferred is found in exhibits C-1, C-24 and R-6 (Exhibits C-24 and R-6 are identical). Exhibits C-24 and R-6 include testimony of Samuel Kunz given in the Rexburg Decree proceedings. Samuel Kunz testified that J.J. Miller irrigated about nine acres at that time, but does not state where those nine acres are. Exhibit C-1 is a 243 Claim filed by Roy Miller stating that 8 acres of his property was irrigated in 1904 under water right 22-405. Michael Holliday testified that the place of use identified in Exhibit C-1 is on property located north of the Claimant's property. Thus, there is no evidence of a transfer of water right 22-405 to the Claimant's property by 1915, meaning that any subsequent irrigation of the Claimant's property constitutes a new appropriation rather than a use of water right 22-405.

Moreover, even if there was evidence that a portion of water right 22-405 was transferred to the Claimant's property within five years after the Rexburg Decree, that right was still forfeited by non-use by the time the electric pump was installed in 1969. As explained above,

there is no evidence of irrigation of any of the Claimant's property prior to 1969. In contrast, there *is* evidence that the Claimant's property was *not* irrigated between 1941 and 1969. First, Don Miller was unable to give any reliable description of irrigation of the Claimant's property during his lifetime, indicating no irrigation of the property during that period. Second, Exhibit C-30 and the testimony of Larry Kunz and Todd Dustin provide compelling evidence that the Claimant's property was not irrigated from 1960 to 1969. Third, and most significantly, Exhibit C-3 persuasively shows that no irrigation of the Claimant's property occurred from the time Roy Miller acquired it in 1941 to the time that he installed a pump and sprinklers. In that 243 Claim, Roy Miller says nothing of a change in water use. Rather, in response to the question: "When was the water first applied to a beneficial use," he states "July 21, 1969." (Ex. C-3.) Roy Miller had owned and possessed the property since 1941. Had the property been irrigated between 1941 and 1969, Roy Miller—who believed water rights to be a matter of importance—certainly would have cited the earlier priority date. The fact that Roy Miller did not claim a water right prior to 1969, even though he had claimed an earlier right for other property (*see* Ex. C-1), powerfully demonstrates that there was no irrigation of the Claimant's property between 1941 and 1969. Consequently, even if water right 22-405 had at some time been used on the Claimant's property before Roy Miller acquired it in 1941, the right was forfeited by the time the electric pump was installed in 1969.

Theoretically, water right 22-405 could have been transferred and used upon some other property by 1915, and then transferred again to the Claimant's property in 1969. However, to prove this, the Claimant would have to show what land was dried up in 1969 when water was transferred to his property. Again, however, the Claimant identified no acres dried up in 1969 to allow irrigation of his property.

The reality is that there were more—not fewer—acres coming under irrigation from Paradise Springs in the late 1960s as farmers in the neighborhood began installing sprinkler lines. For the Court to accept the Claimant's theory that a transfer occurred, the Court must assume that Roy 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. Moreover, the Court must rule that an accomplished transfer occurred without any evidence of a transfer. The truth is, Roy Miller did not move water from somewhere else onto the Claimant's property in 1969; he made a new appropriation. It was a new and additional use of Paradise Springs that reduced the

volume of water available to other waters. The SRBA Court got it right in decreeing water right 22-11639 with a priority date of July 21, 1969, for all of the Claimant's property.

Moreover, even if there was a legitimate basis to claim accomplished transfer, the Claimant'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. The reality is that irrigation of Claimant's property increased the demand on Paradise Springs and increased level of water consumption from the Springs. There was no drying up of other land at the time. Had the Claimant's property not come under irrigation, there would be less demand on the spring and less consumption, resulting in increased recharge to the local aquifer.

The Claimant has worked very hard to have the Objectors' water rights curtailed, claiming that they impact flows from Paradise Springs. The problem—and the reason he has not been successful to date—is that the Claimant's water right is junior in priority to the Objectors. It would be a perversion of the accomplished transfer statute to allow the Claimant to obtain a 1904 priority date for a water use that in reality began in 1969.

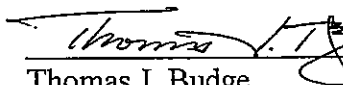
CONCLUSION

The Claimant's request for a 1904 priority date under water right numbers 22-13212 and 22-13503 should be denied because the Claimant's property was not irrigated until 1969, and because there is no competent evidence of a legitimate transfer of an earlier-priority water right to the Claimant's property in 1969. Water right 22-405 is not a piece of personal property that could be held in the Millers' pocket for half a century, used for the first time in 1969, yet receive a 1904 priority date as if it had been continuously used. The truth is, Roy Miller made a new appropriation when he began irrigating the Claimant's property in 1969. Therefore, water rights 22-13212 and 22-13503 duplicate water right 22-11639 which was properly claimed in the SRBA, recommended by the IDWR, and decreed to the Claimant.

RESPECTFULLY SUBMITTED.

DATED this 29th day of October, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2009, the above and foregoing document was served in the following manner:

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THOMAS J. BUDGE