

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# 39576

Subcases 22-13503 and 22-13212

Post Trial Brief

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DEPARTMENT OF
WATER RESOURCES

Introduction

In Mr. Budge's pre-trial brief, he alleges two issues remaining for trial, the first of which is whether the Reid property came under irrigation by means of an accomplished transfer of water right 22-405, and whether the Reid property was irrigated by gravity flow prior to the installation of the electric pump. Later in that brief, Mr. Budge alleges that if an accomplished transfer took place, either there was forfeiture or it injured his clients. At the trial, the evidence presented showed that the Reid property received gravity flow irrigation from Paradise Springs as soon as the south ditch was constructed from the upper spring pool, and that without forfeiture, an accomplished transfer took place within the original claimed place of use for the JJ Miller right, #22-405.

IDWR's Case

IDWR presented all of the evidence necessary to prove that it was possible to irrigate the Reid property by means of gravity flow, and this was not controverted by Mr. Budge. IDWR agreed that the JJ Miller right could not and had not ever been used on the decreed place of use, JJ Miller's original homestead. They agreed that JJ Miller had been using his water within the claimed place of use since he homesteaded the area in 1901. IDWR also agreed that JJ Miller had been using the full 2 cfs decreed to him by the Rexburg Decree. Mr. Budge presented no evidence that any of the above was untrue. Where the State and I disagree concerns whether or not there has been an accomplished transfer of 22-405 onto the Reid property, and the evidence shows there was such a transfer.

Mr. Holliday conveniently ignored and reclassified evidence based on faulty assumptions to conclude there had been no accomplished transfer. When I began the SRBA process with Mr. Holliday's predecessor, Mr. Galbraith, we started at the point where Mr. Holliday finished, and it was because of solid evidence that Mr. Galbraith changed his recommendation to agree with what was claimed and then made the original recommendations in agreement with Don and Rex Miller and I, the only claimants of the Miller right, 22-405. I know for a fact that Mr. Galbraith and his superiors knew that the Reid recommendations would be challenged and went to extreme measures to make sure that all of the needed evidence was in the file.

Exhibit R-42 was created for Mr. Galbraith to show that all of the legitimate successors to the JJ Miller right were in agreement about where 22-405 had been and was being used. When examined about this exhibit, Mr. Holliday suggested that not all the parties were represented on this signature page and he named Richardson Family Properties, Russell Bourne and successors (Aldeen), and Ron Miller, representative of the Fred Miller Trust as those missing. He admitted that if these parties had been signers on ex. R-42, then his recommendation would have been very close or exactly what Mr. Galbraith had recommended. What Mr. Holliday did not take into consideration were the following facts. First, Richardson Family Properties who now owns Paradise Springs subdivision were successors to Rex Miller after the creation of ex. R-42. Rex testified to this, and so they are therefore bound by the agreement made in exhibit R-42. Russell Bourne (now Aldeen) lived on the east side of Cedron Rd and on land covered by the Caroline Withrich right, and is therefore not a party concerning the JJ Miller right. This leaves the Fred Miller Trust as a potential claimant in Mr. Holliday's opinion. When I asked Mr. Holliday if it would surprise him to know that I called Ron Miller and told him to file a claim, he answered "no." In fact, I did call Ron Miller and encourage him to file a claim. He did so and this was recommended as a 1960 priority. He did not claim the JJ Miller right nor was he recommended for such, nor did he protest either my recommendation or Don Miller's recommendation or Rex Miller's recommendation, showing his agreement. This is because the Fred Miller's didn't use water up on their place until after sprinklers were installed by Chet Miller. It is true that it may have been physically possible for Paradise Springs water to gravity flow onto about an acre of the 40 owned by the Fred Millers, but this would have been incidental. In fact, using the same formula that Mr. Holliday used to decide how much water to recommend onto the Reid property, which is 2 cfs divided by 68.1 acres, we get .0293 cfs/acre and the maximum claim under Mr. Holliday's system for the Fred Millers would be about 0.0293 cfs which is negligible. Rex Miller owned a little more than 50 acres prior to selling to Richardson; his proportional share would have been more than 1.468 cfs. However, Rex recognized the accomplished transfer and subordinated his proportional share in ex. R-42 in favor of the accomplished transfer onto the Roy Miller place. This alone would make available for transfer nearly .5 cfs onto the Reid property, and in addition to what was recommended under the 5 acres that had gravity flow (0.16 cfs), increase the total water due to Reid to at least 0.63 cfs. The original recommendation was for 0.7 cfs as claimed and this was correct, reflecting a complete and true understanding of the situation.

Mr. Holliday came up to Paradise Springs and failed to find the old north ditch, which is full of water right now; he failed to see the headgate which regulates water flow to the south ditch; he talked to some people who had

lived in the area less than 6 months and took their word for the fact that there were no old ditches around. He said he didn't contact any of the knowledgeable people to prevent bias; but in doing so, he overlooked all of the evidence. There certainly are other ways to prevent bias, like including a party from both sides, but Mr. Holliday failed to do this and failed to gather any pertinent information. He acted similarly in his review of the Miller Decree. If he had contacted me and asked why Mr. Galbraith had recommended my rights as claimed, I could have given him the information he needed. Instead, he tried to figure things out himself, ended up overlooking all of the evidence again, and making faulty assumptions concerning exhibit R-42. It was a completely ineffective site visit followed by an equally ineffective re-recommendation. The Reid water claims should clearly have been recommended as claimed, as Mr. Galbraith recommended them, and not as Mr. Holliday's re-recommendation suggests.

The Accomplished Transfer

Mr. Budge argues that no transfer took place, that LeRoy Miller created a new demand in 1969 that reduced the volume of water available to other users, and deserves a 1969 priority date. He also argues that there is no evidence of lands dried up or that if there is, it exceeds the 5 year forfeiture rule and that partial forfeiture took place instead of the transfer. None of this has any basis in fact.

There have been no arguments that JJ Miller used less than 2 cfs of the water decreed to him. Exhibit R-42 details what the legitimate successors to the JJ Miller right believe has happened to that water, and it supports the original claims and recommendations. Don Miller, Craig Kunz, and Larry Kunz all testified that their water use on the Reid property was never called for by other users on Paradise Springs. If the accomplished transfer did place a higher burden on Paradise Springs or reduce the volume of water available to other users, the other users didn't notice. This goes directly to what other water users knew, namely that the Miller's were simply using what was their water on different lands. When Hawley asks George Walton (ex. R-5) about whether or not there would be enough water for he, Miller, and Withrich, he answers "I think so." This is not a ringing endorsement, and even then the original homestead users knew that this was a small creek that would barely supply all needs. Any new uses of water beyond the 3 homestead claims would have put a significant additional burden on Paradise Springs and senior homestead right users would have had to make a call to have enough for themselves. No such call was ever made. No additional burden was put on any of the other users when the accomplished transfer took place in 1969. Don Miller testified that claim 22-4104 was an attempt to document this transfer and ensuing use on the LeRoy Miller place.

Mr. Budge has made some sort of claim, without proof, that his clients suffered injury by this accomplished transfer. Because of their junior priority date, they may, in the future, suffer the fate of being curtailed due to their junior date, but this in itself is not injury. This would in effect simply reinforce the idea of the priority doctrine applying to all parties. He implies less recharge makes less water available, but does so without knowledge of the recharge programs that are now in place around the Springs. Reid testified that he opened the north ditch as a means to help himself by recharging the area which might help the Spring flow for a longer period of time. No mention was made of the other recharge projects that were initiated by Reid, but since there is no quantifiable evidence that there is less recharge now than before the accomplished transfer, there can be no such injury. This is the type of issue that will be decided by the Director of Water Resources during the conjunctive management phase of the case and is inappropriate to argue here and now.

Forfeiture

This is the most ridiculous claim of all. It is so ridiculous that I had trouble understanding when Mr. Budge was claiming forfeiture occurred. No case was made for such between 1901 and 1940, and the evidence supplied including exhibit R-20 details water use during that time and was not controverted. Don Miller testified that his Uncle Sam Miller had surveyed the ditch appurtenant to the Reid property and had used the water as best as possible. Don also testified to his father's use of water on his pasture, and pointed out on the 1960 USDA aerial photo (ex. C-30) the place where the ditch was, where the pasture was, and where the willows along the ditch were located. The photo showed all of these things quite well. So the forfeiture claim must be after this point. Mr. Budge focused much of his questions around this time period of 1960-1970, and on the face of the claims, it does appear that there is more than a 5 year period between the 1963 claim by Chet Miller and the 1969 claim filed by LeRoy Miller. Mr. Budge established through his questioning of Rex Miller that the tractor pump had been installed in 1963 and that the electric pump had gone in in 1971. He also asked Rex if the tractor pump belonging to Chet had ever been used on the Roy Miller place, and Rex answered no. Obviously, Mr. Budge is aware of the unprovable rumor that water was pumped on to the upper regions of the Roy Miller place before 1969. One story is that Chet let Roy use the pump; another is that Duane Kunz used his tractor pump. In fact, Larry Kunz testified that the pumping pool was in existence when he helped Roy install the electric pump in 1969, and Todd Dustin testified that as a 6 year old, he could clearly remember that there were no ditches anywhere on the Roy Miller place. What he meant was that there were no ditches anywhere on the Reid property. If any of Dustin's testimony can be trusted, this means the ditch visible in the exhibit C-30 had already been remodeled in 1968. Decommissioning a ditch is a time consuming, difficult process that would only lower property value unless there were a means to replace it. I have no idea why a man would take on such a task one moment before he had the means to replace the function of the ditch, and this suggests pumping prior to 1969 as well. All of these circumstantial facts do not provide a provable case—but these rumors are not the reason that forfeiture did not exist. In fact, if the claim 22-4142 is closely examined, what is shown is that in 1963, more land was irrigated with either the same amount of water or with slightly more water, and

that no water could have been forfeited between 1963 and 1969.

Careful examination of 22-4142 shows that it is a claim for 0.65 cfs for 55 acres within T4N, R4SE, Section 19, the SE of the SW and the SW of the SE. Reid testified that the POU of the Withrich right included the SW of the SE of Section 19, so the 35 acres within the SW of the SE of 19 has no bearing on the JJ Miller right, only on the Withrich right. The claim further states that 20 acres in the SE of the SW of 19 were to be included in this expansion. The State presented some great maps and photos of the SE of the SW, none greater than the photo Mr. Holliday took of the ponds in the Subdivision which now occupies the SE of the SW. One can see in this photo that the land north and east of the ponds is elevated beyond the reach of gravity flow. There are about 15 acres that would have lain above the ditch, and it is certainly these that would have been irrigated from the pump. Chet Miller, in his statement (R-20), talks about how they were never able to get the NE corner under irrigation. For him to mention such a thing shows that it was important to him to get this under irrigation, and using the pump and sprinklers, he would have been able to do this. There would have been no reason to decommission the north ditch at this point, so it seems that the lands historically flooded by the north ditch were still being flooded in 1963 and that the pumping was additional to that. Whether or not flooding and sprinkling occurred at the same time which would be a slight expansion of water use, or whether flooding was done at another time than sprinkling which would have constituted an expansion of acreage, we can't know for sure. We can know that no water was forfeited. In fact, both Craig Kunz and Rex Miller testified that the North ditch was in use when they were younger. Since they didn't graduate from high school until 1966, and neither mentioned the decommissioning of the north ditch, we can assume it was there at least through 1966. Perhaps more water was used in 1963, perhaps the same rate (2 cfs) covered a little more land, but no water was forfeited.

Some time around 1969, between then and 1971, the arrangement that is stated in exhibit R-42 began to exist and this is when the actual accomplished transfer can be proved to have occurred, and no injury was felt by any other user on the Paradise Springs system.

Claims 22-4104 and 22-4141

Over and over, Mr. Budge has tried to highlight these claims as being 100% correct in every way and applicable and appurtenant to the Reid property. As Don Miller testified, he and his father were under the pressure of the filing deadline and did the best they could to document the water use that was happening on the LeRoy Miller place. 22-4141 was filed to document the land that Roy had continued to flood through 1983, namely, the 8 acres under the ditch in the NE of the NW of Section 30. Claim 22-4104 was filed to document the land that he was sprinkler irrigating in 1983. Both remarks are identical and indicate that LeRoy Miller was filing on his father's water right, 22-405. Although 1969 was the date that the permanent pump was installed, this was not the first time water had been applied to the SE of the NW of Section 30. In fact, the 5 acre pasture had been flooded since the south ditch was dug, presumably in 1904. The claim was not concerned with this fact because it was to document where the conversion to sprinkler irrigation was irrigating and when the sprinklers were installed. It was, in the mind of LeRoy Miller, all his father's water that was now his. This claim, 22-4104, would be correct if it had the homestead priority date with a note that the conversion to sprinklers happened in 1969.

In addition to the deadline and not being educated in water law, there was the problem of the mistake with the Miller Decree. If you were to ask an agent how to file a recommendable claim on a decree not appurtenant to your land, it is likely that they would advise you to file the rights as claimed, with the 1969 priority. All of these things together bring a clearer picture of the extreme difficulty of owning and filing correctly on the JJ Miller right. The Miller's did admirably to get where they got to, and should be forgiven for the mistake on the priority date that they (or the receiving IDWR agent) made.

Conclusion

On Paradise Springs, and especially with the Miller right, many mistakes were made. The first, which was responsible for many of the others, was the clerical mistake made with regard to assignment of the JJ Miller right to his old homestead, a place he left because of the complete inability to get water for either irrigation or culinary purposes. JJ Miller knew that his original homestead could not have been irrigated from Paradise Springs or he would have done so and claimed an 1896 priority. Instead, he moved to the place he claimed on both water and homestead documents, the E 1/2 of the NW of Section 30 and the E 1/2 of the SW of Section 19. No evidence has been presented and no one argued that JJ Miller used less than the 2 cfs decreed to him. Within the original claimed place of use, an accomplished transfer took place in 1969 that allowed irrigation of the upper regions of the Roy Miller property as well as the upper regions of other portions of the JJ Miller homestead. Claims 22-4104 and 22-4141 claim .96 cfs from Paradise Springs and together with the .04 cfs stockwater, this adds up to the 1 cfs that Roy Miller received from JJ Miller, his father. The Miller's are so honest that they didn't claim the additional .04 cfs for irrigation they were due and instead claimed it as stockwater. In fact, the greatest mistake in the filing of claims 22-4104 and 22-4141 was too much honesty coupled with the desire not to take more than they owned. Craig Kunz testified that my own (Reid) water use is conservative and the truth is that like the Millers, I only want what I own legally as well. I milk cows, have a huge garden, and live in the same way my predecessors have for more than 100 years; I want to use my water the same way they did and for the same purposes. The objectors case was brought as a desperate, last ditch attempt to save themselves from conjunctive management and to delay the onset of such, and not because of actual issues. Mr. Budge did a good job of raising whatever issues there were, but none has legs and none of his contentions were proved. IDWR did no better than Mr. Budge while playing the same game. All of the

objective evidence points to a good, long history of water use on the JJ Miller homestead, #8850. No objective evidence points to any forfeiture of his decree in part or in full. Mr. Budge has argued that only theoretical water use took place but in fact the witnesses who testified talked only about actual water use, and those witnesses date back to 1905 and the Rexburg Decree. The only baseless theories that have been presented were from Mr. Budge.

Since all of the evidence indicates that the initial recommendations were correct, I urge the Special Master to rule in favor of the original recommendations and pray for relief from Mr. Budge and IDWR.

I swear that the above is the truth and nothing but.

So sworn this 29th day of October, 2009, by

A handwritten signature in black ink, appearing to read "ML Reid", written over a horizontal line.

Michael L Reid
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