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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

APR 21 2010

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

) Subcase No: 63-32533

Case No. 39576

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MEMORANDUM DECISION AND
ORDER ON CHALLENGE

Ruling: The ruling of the Special Master is **affirmed**.

I.

APPEARANCES

Albert P. Barker, Paul L. Arrington, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho,
attorneys for Wilder Irrigation District.

Joe Aten, *pro se*.

II.

FACTS AND PROCEDURAL BACKGROUND

1. Joe Aten, Matthew Aten, Bill Aten and Maria Morales (collectively, "Claimants") filed a *Notice of Claim to a Water Right* for water right claim 63-04035 in which Claimants claimed .20 cfs of water from the "Case Drain Ditch" in Canyon County, Idaho for irrigation purposes and .03 cfs for stockwater purposes. The basis of the claim was beneficial use and Claimants sought a priority date of November 4, 1933.

2. Prior to the filing of the *Director's Report* by the Idaho Department of Water Resources ("IDWR"), water right claim 63-04035 was split into water right claims 63-32533 and 63-32534. Water right claim 63-32533 is at issue here.¹

¹ Water right claim 63-32534 has changed ownership and is not at issue here.

3. The *Director's Report* for water right claim 63-32533 recommended .13 cfs from the "Case Drain" for the irrigation of 6.7 acres and .03 cfs for stockwater use, with a priority date of November 4, 1933.²

4. The *Director's Report* further recommended that the following remark accompany water right claim 63-32533:

This right remains subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

5. On June 18, 2007, Wilder Irrigation District ("District") filed an objection to the water right claim, making alternative assertions that the source of the water right claim is wastewater belonging to the District as the original appropriator, and that the water right claim was developed in trespass of its drains and therefore should not exist.

6. On August 6, 2009, the District filed its *Motion for Partial Summary Judgment*, arguing that water right claim 63-32533 is a wastewater right which diverts water gathered by the District in the Case Drain. In addition, the District sought the inclusion of the following wastewater remark in place of IDWR's recommended remark: "The source of this water is wastewater. The wasting of water may be discontinued at any time."³ The District's *Motion* was supported by briefing, the *Affidavit of Vern E. Case* and the *Affidavit of Paul L. Arrington*.

7. Claimants did not respond with briefing or affidavits to the *Motion for Partial Summary Judgment*, and did not appear at the hearing on partial summary judgment before Special Master Booth.

8. On September 14, 2009, the Special Master issued his *Order Granting Motion for Summary Judgment; Special Master's Report; Findings of Fact and Conclusions of Law* ("Order Granting Summary Judgment"), finding that there were no genuine issues of material fact and that the record established that the source of water right claim 63-32533 is wastewater first diverted by the District.

² The Claimants did not object to the *Director's Report* recommendation that the source of water right claim 63-32533 was the "Case Drain."

³ In its *Motion for Partial Summary Judgment*, the District agreed to withdraw its remaining objection that water right claim 63-32533 was developed in trespass of its drains and should not exist should its *Motion for Partial Summary Judgment* be granted.

9. The *Order Granting Summary Judgment* recommended that water right claim 63-32533 be decreed with the elements as set forth in the *Director's Report*, with the exception that the wastewater remark included therein by IDWR be deleted and replaced with the remark proposed by the District.

10. On October 27, 2009, Claimants filed a hand-written letter to alter or amend the Special Master's *Order Granting Motion for Summary Judgment*, wherein they requested a jury trial for the purpose of allowing them to present evidence.

11. On November 27, 2009, the Special Master treated the letter as a Motion to Alter or Amend the Recommendation and entered his *Order Denying Claimant's Motion to Alter or Amend*.

12. On December 11, 2009, Claimants filed a hand-written letter "to challenge" the *Order Denying Claimant's Motion to Alter or Amend* with this Court. This Court treated the letter as a Notice of Challenge and issued a *Scheduling Order*.

13. Claimants argue on Challenge that the water in the Case Drain is, in all or part, spring water which runs all year round, as opposed to wastewater, and which they have the right to divert and put to a beneficial use under water right claim 63-32533.

14. Following the submittal of briefing by the parties, hearing on the Claimants' Challenge was held before this Court on April 2, 2010.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on April 2, 2010. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or April 5, 2010.

IV.

DISCUSSION

A. Standard of review on challenge.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are

clearly erroneous, a reviewing court “inquires whether the findings of fact are supported by substantial and competent evidence.” *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master’s conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master’s conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court’s standard of review of the special master’s conclusions of law is one of free review. *Id.*

B. The Special Master did not err in recommending that the water claimed by Claimants under water right claim 63-32533 is wastewater first diverted by the District.

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56. Rule 56(e) provides that when a motion for summary judgment is supported by affidavits the opposing party is required to set forth evidence showing that there is a genuine issue of material fact for trial:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party **may not** rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, **shall** be entered against the party.

(emphasis added).

In this case, the District moved for partial summary judgment arguing in part that the source of water right claim 63-32533 was wastewater belonging to it as the original appropriator. The District’s *Motion* was supported by the *Affidavit of Vern E. Case*. Case testified that “water in the Arena Drain, Case Drain and East Arena Drain is waste water

that is gathered throughout the Wilder Irrigation District.” (Case Aff., ¶6). Case further testified that “all water delivered from the case drain by way of the East Arena Drain to the Aten property is waste water.” *Id.* The District’s *Motion* was further supported by the *Affidavit of Paul L. Arrington*, which contained as an exhibit a written statement of Bill Aten – one of the Claimants – stating “My father Walter Ray Aten put a tile under the riverside ditch to get drainage water out of what is know as ‘Case drain.’” (Arrington Aff., Ex. A) (emphasis added).

Given the affidavits filed by the District in support of its argument as to the source of the water at issue, Claimants were required under Rule 56(e) to submit evidence to the Special Master creating a genuine issue of material fact as to the source of water right claim 63-32533. However, Claimants failed to file any affidavits, briefing or other evidence in response to the District’s *Motion* and did not appear at oral argument before the Special Master. On Challenge Claimants did not present any argument regarding, or proffer any justification as to, why they failed to appear, respond to, or defend against the District’s *Motion*.

Although Claimants appeared *pro se*, this Court is required to hold them “to the same standards and rules as those represented by an attorney.” *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123, 2005. Moreover, while a court may make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard, courts are required to apply the Idaho Rules of Civil Procedure to *pro se* litigants in the same manner as they would be applied to an attorney. *See e.g., Shelton v. Shelton*, 148 Idaho 560, ___, 225 P.3d 693, 698 (2009) (stating “the pro se litigant is entitled to have the rules of civil procedure applied to him or her in the same manner as they would be applied to an attorney”); *see also*, Comment 2.2 to Model Code of Judicial Conduct (stating, “a judge can make reasonable accommodations to ensure pro se litigants the opportunity to have matters fairly heard”).

Since Claimants failed to respond to the District’s *Motion for Partial Summary Judgment*, and since the evidence in the record regarding the source of water right claim 63-32533 was undisputed, the Special Master did not err in his recommendation that the water claimed by Claimants under water right claim 63-32533 is wastewater first diverted by the District.

C. The Special Master did not err in recommending water right claim 63-32533 be accompanied by the wastewater remark proposed by the District.

The right to appropriate surface waste and seepage water for beneficial use is recognized in Idaho. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176, 177 (1927). However, such water is appropriated “subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it so long as he applies it to a beneficial use.” *Id.* (emphasis added). The Idaho Supreme Court has further directed that “[n]o appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former.” *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980).

In *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945), the Idaho Supreme Court addressed the issue of a wastewater appropriator’s right to the use of wastewater as against the original appropriator. In that case, the senior appropriator, Mountain Home Irrigation District, used its water to irrigate a plot of very porous soil resulting in a quantity of seepage water that had been openly and notoriously used by the junior appropriator, Colthorp. *Id.* at 178, 157 P.2d at 1007. After the Irrigation District changed the point of diversion and place of use of its water to another parcel of land within the district, Colthorp sued to enforce his claim to the seepage water. *Id.* Specifically, Colthorp argued that the changes in point of diversion and place of use wrongfully deprived him of the use of the seepage water. *Id.* The Idaho Supreme Court disagreed.

While the Court recognized Colthorp’s right to appropriate the seepage water, it noted that Colthorp’s right was subject to the right of the Irrigation District to (1) cease wasting the seepage water, (2) in good faith to change the place or manner of wasting it, or (3) to recapture it, so long as the Irrigation District applied it to a beneficial use. *Id.* at 179, 157 P.2d at 1007. Further recognizing the policy of this State to prevent the wasting of water the Court held:

It must be conceded [the Irrigation District] could not be required to continue to irrigate the Lockman ranch; that [the Irrigation District] could not be required to continue to waste 75% of the water decreed to it, for the

benefit of [Colthrop]; that [the Irrigation District] could not be enjoined from ceasing to waste such decreed water and making beneficial use of it .
...

Id. at 182, 157 P.2d at 1009. Thus, the Court affirmed the district's court's dismissal of Colthrop's claim. *Id.*

The SRBA court previously addressed the general rule governing the use and limitations on waste water:

The general rule is well established that waste water and seepage (leakage from canals, etc.) resulting from the beneficial use of a water right may be recaptured and reused by the original appropriator of a water right so long as the recaptured waste water is put to a beneficial use. *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 214 P.2d 880 (1950); *Sebern v. Moore*, 44 Idaho 410, 258 P.2d 176 (1927). Third parties may appropriate the waste water after it leaves the control of the original appropriator. However, the right of the third party appropriator is subject to the paramount right of the original appropriator to later recapture and reuse the waste water or to later reduce the quantity of waste water through the implementations of more efficient water use practices. See e.g. *Colthrop v. Mtn. Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945). The situation is different if after the original appropriator relinquishes control of the waste water and the water returns to, and is commingled with, a natural stream or aquifer prior to be appropriated by a third party. The water is then considered "return flow" and is subject to appropriation by third parties as part of that tributary body of water. In such a situation, third party junior appropriators relying on the return flow have rights which in effect place limitations on the original appropriator's ability to alter the consumptive use of the original right. See *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926); *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 506 (1944) (establishing junior user's right to existing conditions).

Order on Challenge (A & B Irrigation District), Subcase Nos. 36-02080 et al., (April 25, 2003), p. 16 (footnotes omitted); *affirmed A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005).

In this case, the District sought the inclusion of the following remark to accompany water right claim 63-32533 for purposes of administration: "The source of this water is wastewater. The wasting of water may be discontinued at any time." Idaho Code § 42-1411(2)(j) provides that a water right should include "such remarks and other matters as are necessary for definition of the right, for clarification of any right, or for administration of the right by the director." The remark proposed by the District is

consistent with the District's rights under Idaho law as the original appropriator to cease wasting water. Like the original appropriator in *Colthrop*, the District in this case cannot be required by Claimants to continue to waste its decreed water for their benefit so long as its decision to discontinue its waste is otherwise consistent with Idaho law. The Special Master did not error in his application of the law in recommending water right claim 63-32533 be accompanied by the wastewater remark proposed by the District.

D. Claimants' argument that the source of the water claimed under water right claim 63-32533 is, in all or part, spring water as opposed to wastewater is not supported by the record.

On Challenge, Claimants argue that the source of the water claimed under water right claim 63-32533 is, in all or part, spring water as opposed to wastewater. While no affidavit supporting this argument was offered to the Special Master or is contained in the record, it should be noted that the remark recommended by the Special Master applies only to water that is first diverted and used by the District as the original appropriator. In the event there is in fact spring water in the Case Drain, as alleged by Claimants, it will continue to flow even if the District ceases wasting its water in a manner consistent with Idaho law.

V.

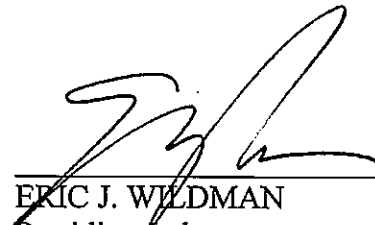
ORDER

For the reasons set forth above, Claimants' Challenge is **HEREBY DENIED**. Pursuant to I.R.C.P. 53(e)(2) and *AOI* section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the Special Master's *Order Granting Summary Judgment* and *Order Denying Claimant's Motion to Alter or Amend* and wholly adopts them as its own. Water right claim 63-32533 will be decreed as recommended by Special Master Booth in the *Order Granting Motion for Summary Judgment*.

RULE 54(b) CERTIFICATE

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

Dated April 21, 2010



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE was mailed on April 21, 2010, with sufficient first-class postage to the following:

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