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DEPARTMENT OF  
WATER RESOURCES

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| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |                       |
| MAY 28 2010                                                                             |                       |
| By _____                                                                                | Clerk<br>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     | ) | FINDINGS OF FACT AND           |
|                | ) | CONCLUSIONS OF LAW AND         |
| Case No. 39576 | ) | REQUEST FOR IDWR TO            |
|                | ) | CALCULATE ACREAGE              |
|                | ) |                                |
|                | ) | WATER RIGHT NOS.: 22-13212 and |
|                | ) | 22-13503                       |

I. PROCEDURAL BACKGROUND

The claimant of these water rights is Michael Reid. Mr. Reid lives in Victor, Idaho on land once owned by J.J. Miller. He purchased the land in 1999 and operates a small dairy which produces milk and cheese. No *Objections* were filed to 22-13503, and a *Partial Decree* was issued November 24, 2008. A *Motion to Set Aside Partial Decree* was granted, putting this right at issue. *Objections* were filed to 22-13212. Cedron Irrigation LLC, Mahogany Ranch Holdings, Teton Rainbow Ranch Inc., and Wally Rothgeb Jr. (hereafter "Objectors") filed *Objections*.

Prior to trial, both Mr. Reid and the Objectors moved for summary judgment. Mr. Reid argued that 22-13503 and 22-13212 are derived from J.J. Miller's water right 22-405. Water right 22-405 was decreed to J.J. Miller with a priority of June 1, 1904 in *Rexburg Irrigation Co. v. Teton Irrigation Canal Co.* (6<sup>th</sup> Dist., Fremont Co., Dec. 16, 1910) (hereafter "*Rexburg Decree*"). Mr. Reid argued that 22-405 and its derivative rights should have a priority of May 23, 1901. The 1901 date was based on the date of J.J. Miller's homestead application. That issue was decided on summary judgment. The *Order on Summary Judgment* (Sept. 21, 2009) held that the court could not go behind the 1904 priority date already determined in the *Rexburg Decree*.

1. The change was made before November 19, 1987;
2. No other water rights existing on the date of the change were injured; and
3. The change did not result in an enlargement of the right.

### III. ISSUES

IDWR recommended a small part of 22-405 to Michael Reid to cover just 5.3 acres. IDWR declined to recommend the entire 35.6 acres claimed. Based on observations of the point of diversion and topography of the place of use, IDWR determined that Mr. Reid's remaining land is too high in elevation for gravity irrigation to have reached the place of use in 1904. Michael Reid disagreed with the recommendation, seeking the entire 35.6 acres and asking for an even earlier priority of 1901. Objectors disagreed with the recommendation of 5.3 acres. Objectors asserted that IDWR's recommendation was improperly based on speculation. They argued that Mr. Reid and his predecessors did not put water on the place of use until 1969. Thus, the issues are:

1. Is 22-13212 properly based on water right 22-405 from the *Rexburg Decree*?
2. If 22-13212 is based on the *Rexburg Decree*, what is the place of use?
3. What is the correct acreage that can be traced from J.J. Miller's water right?
4. Is there a basis for a duplicate claim?

### IV. ANALYSIS

#### A. 22-13212 Based on *Rexburg Decree*

Mr. Reid claimed this right as derivative of J.J. Miller's water right 22-405 from *Rexburg Irrigation Co. v. Teton Irrigation Canal Co.* (6<sup>th</sup> Dist., Fremont Co.) (Dec. 16, 1910) (hereafter "*Rexburg Decree*") The *Director's Report* recommended this right as part of J.J. Miller's water right with a 1904 priority on 5.3 acres and .16 cfs.

The Objectors asserted that this water right should not exist because Mr. Reid is not entitled to a portion of 22-405 from the *Rexburg Decree*. The *Objection* stated that the only valid water use on Mr. Reid's property relates to much later water use in 1969 claimed under water right number 22-11639. The claimant, Michael Reid, also filed an *Objection*. Mr. Reid's *Objection* asserted entitlement to the entire 35.6 acres and asked for a 1901 priority.

The trial focused on whether Mr. Reid's right was properly derived from the J.J. Miller right and could assert the 1904 date. IDWR concluded that Mr. Reid is entitled to part of J.J. Miller's right in the *Rexburg Decree*, even though the legal description did not include Mr. Reid's land.

the point of diversion, and field exams, IDWR reduced the recommended acreage from 35.6 acres to 5.3 acres and decreased the quantity from .5 cfs to .16 cfs. (IDWR Exhibit 12)

Mr. Reid argued that the acreage should not be reduced. He believed that the entire 35.6 acres was irrigated in 1904. His argument was based on two points. First, a dam was known to have been built in the Paradise Springs area in the early 1900s. Second, Paradise Springs is an artesian springs. Based on that information, Mr. Reid argued that land above the point of diversion and above the contour lines could have been irrigated from Paradise Springs. However, Mr. Reid was not able to present a qualified expert to testify to whether the additional acreage could be irrigated based on the artesian nature of the springs.

The acreage reduction was based primarily on the point of diversion and elevation contour lines of the place of use. Historic aerial photography of the place of use (IDWR Exhibit 18), and observations from a site visit were also considered. (Testimony of Michael Holliday) This information was supplemented by research on the place of use.

J.J. Miller would have used ditches and gravity irrigation in 1904. Agent Michael Holliday observed that the ditches on Mr. Reid's land are not currently located to irrigate the 5.3 acres. He did not know where the ditches were located in 1904. No witnesses were available to testify about the ditch placement of 100 years ago. Therefore, IDWR used a topographic map with contour lines and observations of the place of use to determine that only 5.3 acres within the place of use were able to receive water from Paradise Springs in 1904. (IDWR Exhibits 16 and 17) In addition, Mr. Holliday conducted a field exam of the place of use in September of 2009 to evaluate Mr. Reid's claims. (Exhibit IDWR 15) He observed the Reid land and looked for signs of old ditches. He observed some low areas and also noted a depression north of the springs which could have been an old, irregular ditch. (Testimony of Michael Holliday) Other witnesses testified that ditches on the property have been removed or relocated during their lifetimes. Therefore, IDWR relied on geographic features to determine acreage. (Testimony of Michael Holliday)

The Objectors argued that the *Director's Report* conclusions were faulty because they were based on speculation. Mr. Holliday stated that his recommendation was not based on personal knowledge of whether there was irrigation in 1904 or knowledge of whether there were ditches in 1904 or where those ditches were located in 1904. The *Director's Report*, however, was based on IDWR's understanding of the impossibility of irrigating the land described in the *Rexburg Decree*,

Reid's property and farmed the land in about 1969. Mr. Kunz was not aware of flood irrigation on the Reid property prior to 1969. Mr. Kunz helped J.J. Miller's son install a pump in the ditch in 1969. Mr. Kunz observed that Mr. Reid's property is located up-gradient from the ditch. In Mr. Kunz's opinion as an expert farmer, the Reid land could not have been gravity irrigated from the ditch. Mr. Kunz did not recall seeing any ditches on the Reid land that could irrigate the property during 1969. He did see some plow furrows on the land. Mr. Kunz did not recall if there was a ditch on the property in 1960. He did recall a ditch existing in 1969, but did not recall its exact location. (Testimony of Larry Kunz)

Todd Dustin lives in Victor, Idaho, and was raised on a farm in the area. Mr. Dustin is familiar with Mr. Reid's property. In 1968, he saw no irrigation equipment on the Miller property, and he did not notice any ditches. He believed the Reid land was a dry farm prior to 1969. (Testimony of Todd Dustin) Mr. Kunz and Mr. Dustin were concise and credible witnesses; however, other witnesses testified that flood irrigation did occur on the Reid property prior to 1969.

Although none of the witnesses were alive in 1904, several witnesses testified to water use on the land prior to 1969. Don Miller is the son of Leroy "Roy" Miller and the grandson of J.J. Miller. He grew up near his grandfather J.J. Miller's land. Don Miller testified that some of the Reid land was irrigated prior to 1969. He recalled seeing irrigation water coming down a ditch onto the Reid property from the time he was a little boy. He recalled a ditch running along the pasture and following the contour lines of the land. He remembered watching his father flood irrigate some pasture. The ditch which existed during his childhood was eventually destroyed when a road in the area was enlarged. He noticed that the ditch which exists on the Reid property was in a different location in earlier years. (Testimony of Don Miller)

Craig Kunz also grew up in the Paradise Springs area and currently lives next to Mr. Reid's property. His family owned property near Mr. Reid's land. In the 1950s and 1960s, he observed the Reid land and the crops growing there. Mr. Kunz farmed the Reid land during the 1970s and 1980s. He saw irrigation on Mr. Reid's land prior to 1969 when the pump was put in. (Testimony of Craig Kunz)

Rex Miller also lived in the Paradise Springs area near his Uncle Roy Miller. Rex Miller's father installed an electric pump near the Reid property in 1971. Mr. Miller recalls a tractor pump being used to irrigate prior to 1971. Rex Miller does not believe the tractor pump irrigated the land

evidence regarding how portions of the old “Withrich” or “Walton” rights became appurtenant to Mr. Reid’s property. Since that information was not presented at trial, the court concludes that the record lacks sufficient evidence to prove a basis for this claim. IDWR testified that a portion of the J.J. Miller right was recommended under the other claim, 22-13212. In conclusion, the record lacks “substantial evidence” to rebut the *Director’s Report* conclusion on 22-13503. Therefore, the court concurs with the **disallowance** of claim 22-13509.

## **V. FINDINGS**

### **A. 22-13212 Properly Based on *Rexburg Decree***

The *Director’s Report* concluded that Mr. Reid is entitled to a small part of J.J. Miller’s 1904 water right even though the *Rexburg Decree* described a different parcel. The *Director’s Report* is entitled to *prima facie* weight. The Objectors then have the burden of going forward with evidence to establish that the J.J. Miller right did not attach to Mr. Reid’s land. The Objectors pointed first to the legal description from the *Rexburg Decree* which is in a different location and does not include Mr. Reid’s land. Objectors thereby met their burden of going forward with evidence to rebut the *Director’s Report*. However, the evidence presented at trial must then be considered and weighed. IDWR agent Michael Holliday and other witnesses provided additional testimony. Mr. Holliday testified that it was impossible to irrigate J.J. Miller’s land described in the *Rexburg Decree* by gravity irrigation. However, a second J.J. Miller homestead could be irrigated which included Mr. Reid’s land. In addition, not one claimant in the SRBA asserted a water right from the land described in the *Rexburg Decree*. Michael Reid and other claimants have claimed rights from the second J.J. Miller homestead. Therefore, the court holds that a significant, valid connection exists between the J.J. Miller right and Mr. Reid’s land. Accordingly, the court finds that the legal description for J.J. Miller which was contained in the *Rexburg Decree* was in error because that land was impossible to irrigate from Paradise Springs. The court finds that J.J. Miller owned a second parcel that was irrigated and was the land which should have been described. Mr. Reid’s land is within this second parcel, and his water right was thus derived from J.J. Miller’s right in the *Rexburg Decree*.

### **B. I.C. § 42-1425 Allows Change in Place of Use**

The accomplished transfer statute, I.C. 42-1425 allows changes in water rights in violation of the mandatory transfer procedures. The statute specifically recognizes changes in the place of use

recommendation was speculative. Michael Holliday did not, of course, observe the place of use in 1904. Therefore, he did not have personal knowledge of whether the Reid land was irrigated in 1904 or where the ditches were located in 1904.

In a prior appropriation state, however, a determination of old water rights must be made despite the fact that witnesses are no longer available to testify about what happened 100 years ago. The nature of water rights requires determinations about facts which occurred long ago. Thus, the court holds that it is proper to consider historic photographs, observations of living witnesses, existing features such as depressions near the springs, and geographic features such as contour lines to determine whether to recognize old water rights. In addition, the court concurs with the findings of IDWR that 5.3 acres is the **maximum** acreage that can be recognized relating to the J.J. Miller right. However, that acreage should be slightly reduced. Evidence presented at trial regarding the “swampy area” should be considered.

**1. Marshy Area** Several witnesses discussed a marshy area which existed on the Reid land. This marshy area was shown in red on IDWR Exhibit 18. That exhibit shows harvested crop in white and growing vegetation in red. IDWR agent Michael Holliday testified that the red area was marshy and characterized the area as marshy in 1987 and 1960. Mr. Reid conceded that the red area was growing vegetation. However, he characterized the red area as vegetation due to auxiliary flow from the irrigation system. Michael Reid testified that about half of the red area can be cultivated. That means that half of the area cannot be cultivated. The court concludes that the 5.3 acres should be reduced by half of the area depicted in red in Exhibit 18.

#### **D. Priority/Water Usage**

Prior to trial, Mr. Reid moved for summary judgment seeking a 1901 priority date for his portion of J.J. Miller’s water right. Mr. Reid argued that he was entitled to a 1901 priority date based on J.J. Miller’s homestead claim in that year. Objectors moved for summary judgment seeking a ruling that Mr. Reid could not obtain a date earlier than June 1, 1904.

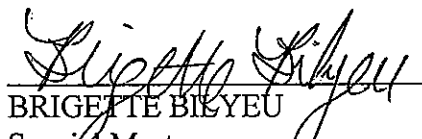
The *Order on Summary Judgment* (Sept. 21, 2009) held that allowing a claimant to reopen an old decree to present evidence of earlier use than was decreed nearly 100 years ago would undermine the principles of *res judicata*, the Idaho Supreme Court’s ruling in *State v. Hagerman Water Right Owners*, and law of the case in the SRBA. Therefore, the *Order on Summary Judgment* declined to allow the priority issue to be reopened.

IDWR's conclusions with the further reduction indicated.

After considering the pleadings, evidence, testimony, and legal arguments of counsel, this Special Master concludes the following. Water was utilized on the Reid property prior to 1969. Water Right 22-13212 is properly derived from J.J. Miller's right in the *Rexburg Decree* and has a priority date of 1904. The acreage for 22-13212 should recognize the 5.3 acreage maximum as determined by the *Director's Report*; however, an additional reduction should be made for half the area depicted as the marshy area shown in Exhibit 18. Water right claim 22-13503 should be disallowed as a duplicate claim.

The court requests, therefore, that IDWR submit a very brief report determining the acreage of the place of use consistent with this order. A full Master's Report and Recommendation will then issue.

DATED: May 28, 2010.

  
BRIGETTE BILYEU  
Special Master  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REQUEST FOR IDWR TO CALCULATE ACREAGE was mailed on May 28, 2010, with sufficient first-class postage to the following:

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