

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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DEPARTMENT OF
WATER RESOURCES

IN RE SRBA

CASE NUMBER 39576

PETITION FOR
RECONSIDERATION
WATER RIGHT NOS.:22-
13212 AND 22-13503

PROCEDURAL BACKGROUND

On May 28, 2010, Special Master Bilyeu issued her Findings of Fact and Conclusions of Law for the trial that involved water right numbers 22-13212 and 22-13503. These water rights are owned by Michael Reid. Prior to the trial, these water rights were both recommended as appurtenant to Mr. Reid's property by former state agent Trent Galbraith. He believed Mr. Reid and Mr. Don Miller, agreeing that both 22-13212 and 22-13503 equal 0.70 cfs and together were for the irrigation of 35+/- acres at 0.02 cfs/acre. After the Order on Summary Judgment, IDWR senior claims agent Michael Holliday reviewed those recommendations and recommended that 22-13503 be disallowed and that 22-13212 be reduced in volume. Mr. Reid objected to the disallowance of 22-13503 and to the reduction of 22-13212 based on the fact that there had been an accomplished transfer in the 1960's, within JJ Miller's stated place of use, that recognized the 1 cfs that Roy Miller had inherited from his father, JJ Miller. Roy Miller filed claims 22-4141 and 22-4104 to document this accomplished transfer. Special Master Bilyeu appeared not to rule on this issue, but did agree with the State that Mr. Reid owned a share of the JJ Miller right, 0.16 cfs for about 5 acres and that flood irrigation was used on the Reid property from the time the dam was constructed in 1904.

ISSUES

The issues that still need consideration are as follows:

1. Did an accomplished transfer take place in July 1969 that moved water within the claimed place of use of the JJ Miller right, leaving 1 cfs of 22-405 on the north side of Paradise Springs and 1 cfs on the south side of Paradise Springs?

2. Is the error in the priority date a clerical error of the exact nature of the one made on the place of use for the same right?

ARGUMENTS

Part 1. The Accomplished Transfer

In section 4-C of Special Master Bilyeu's Findings of Fact, she states:

"...Mr. Reid argued that the acreage should not be reduced. He believed the entire 35.6 acres was irrigated in 1904." In fact, it was not my intent to argue that the entire 35.6 acres was irrigated in 1904—this would have been physically impossible because the land above the ditch was up gradient and water, even from an artesian spring, will not flow uphill. It was my intent to argue that there had been irrigation on Roy Miller's pasture since 1904, where IDWR recommended the right existed, and in the late 1960's there had been an accomplished transfer within the claimed place of use that gave Reid and his field the extra 0.50 cfs he claimed as 22-13503. 22-13212 was a claim created by Trent Galbraith to document what he had calculated as 8 acres below the ditch in 1904 and the 0.20 cfs that would have been appurtenant to those 8 acres.

Exhibit (R-42) is a document where Rex Miller, Don Miller, and Reid, the legitimate claimants of 22-405, all agree that 1 cfs of the JJ Miller right belongs on the north side of Paradise Springs with Chester and Rex Miller and 1 cfs had been transferred by inheritance and accomplished transfer to the south side of Paradise Springs to Roy and Don Miller, and then by sale to Michael Reid. Reid questioned Michael Holliday extensively about why this document (Ex. R-42) wasn't sufficient to prove an accomplished transfer. Mr. Holliday testified that he believed that Richardson Family Properties, a successor of Rex Miller, should have signed that document, and also believed that a signer from the Fred Miller Trust should have signed it. He testified that if those parties were signers, then he would have recommended both 22-13503 and 22-13212 as Mr. Galbraith had. Later, Rex Miller testified that Ex. R-42 was created prior to when he sold to Richardson Family Properties, and as such, Richardson Family Properties would not have needed to be a signer to make Ex. R-42 a legitimate and binding document. In his testimony and post trial brief (Section 2), Reid explains that he believed that Ron Miller, signer for the Fred Miller Trust, had a legitimate claim to a water right based on the Chet Miller pump, and

personally contacted Ron Miller to encourage him to file a claim. Ron Miller did so and was recommended for a water right with a 1960 priority. Although Ron Miller was not available to testify, we can say that no one from the Fred Miller trust protested any of the claims that were made by Rex or Don Miller, or Michael Reid, nor did they protest or disagree with their own recommendation which was not based on 22-405 but on beneficial use beginning with Chet's tractor pump around 1960. Don and Rex Miller also testified that we are not in any disagreement with Ron Miller or anyone with the Fred Miller Trust. From these things, we may infer that the Fred Miller Trust is not opposed to, and even believes that the claims of Rex and Don Miller, and Michael Reid, are accurate.

Water right 22-4104 documents the accomplished transfer of water within the original claimed place of use of the JJ Miller right and onto land owned by Michael Reid. The method of delivery was a pump and pipeline that made irrigation of the upper regions, as well as the lower regions of the Reid property possible. Claims 22-4104 and 22-4141 made by Roy Miller, along with his stockwater claims, add up to 1 cfs. Claims 22-4142 and later 22-12714 made by Chester Miller also claim a total of 1 cfs. This adds to the evidence that Chet and Roy split their father's water, 2.0 cfs, after his death in 1963. There is no known will from JJ Miller, yet all the legitimate successors are in agreement that the water was split evenly and all of the claims reflect this (Ex. R-42).

In my Post Trial Brief, I argued for the accomplished transfer:

“...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.”

I further argued that the accomplished transfer was transparent in section 2 of my Post Trial Brief:

“...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 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 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...”

Even if it is not believed by the court that Roy and Chet Miller split their father's water right after he died in 1963, then there is another legal mechanism that backs up this claim, as follows. IDWR, using the same logic and methods applied to the Reid recommendation, would recommend about 1.5 cfs of 22-405 to Rex Miller. If this is so, and if Rex has already agreed that 1 cfs of 22-405 was his and Chet's to claim, and 1 cfs of 22-405 belonged to his Uncle Roy Miller, then it matters not what the Fred Miller's claim or anyone else anyway because the water (in the eyes of the State) would belong to Rex for his property and he has the final word. This final word was documented in Ex. R-42.

The result of the accomplished transfer is the realization of JJ Miller's original claim. Because of the transfer, within the claimed place of use for 22-405, there are now 100 acres irrigated using 2 cfs. 35.6 of those are the Reid property. There has been no enlargement, nor did the resulting rearrangement injure any other rights existing on that date.

So does this accomplished transfer meet the requirements of I.C. 42-1425? It took place prior to November 19, 1987; no other water rights existing at that time were injured; and the change resulted in no enlargement of the right.

Part 2. The Clerical Errors

As part of the trial for rights 22-13212 and 22-13503, I filed a Motion for Summary Judgment that requested a priority date of 5/23/01 instead of 6/01/04. Special Master Bilyeu realized in her order that there is substantial evidence that suggests this is the correct priority date for the JJ Miller right: (From Order on Summary Judgment, 9/21/09)

“JJ Miller filed a Homestead Application in 1896. He was unable to complete the Homestead Application because he could not get water to the

tract for irrigation or culinary purposes (*Motion for Summary Judgment*, Att. A-7.) JJ Miller subsequently filed a second Homestead Application on land near Paradise Springs and a Notice of Water Right on May 23, 1901. (*Motion for Summary Judgment*, Att. C.) The Final Proof of Homestead Entry also indicates that JJ Miller settled on the Paradise Springs land in 1901. (*Motion for Summary Judgment*, Att. A-13, A-12, A-11.)”

Later in the Order on Summary Judgment, Special Master Bilyeu cites a couple cases describing some criteria for correcting clerical errors:

“...those in which “the type of mistake or omission [is] mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney.” *Silsby* explained that motions under I.R.C.P. 60(a)”can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced.””

“...In *Blanton v. Anzalone*, 813 F.2d 1574 (1987), the 9th circuit said:

“the basic distinction between “clerical mistakes” and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of “blunders of execution”...”

To deny me due process based on *res judicata* may have been the right legal decision. However, I was trying to argue that the mistake in the priority date was a clerical error and that the record points to an error as well.

In her order on Summary Judgment, Special Master Bilyeu stated that she took into consideration that this was a request to correct a mistake, which the court can do at any time. She then went on to state that

“neither this court nor Mr. Reid knows why the *Rexburg* court decreed the priority date as 1904. If the decision that a 1904 priority date {was proper} was an error, it would be a legal error, not a clerical error. The decision would have been a legal error because there is nothing to indicate the court meant to decide a 1901 date but made a blunder in execution to write 1904.”

She then decided, without hearing evidence on the issue, that this was not a mistake and therefore would not be corrected. This was the most appealable portion of the *Order*, but since the court can correct a clerical error at any

time, instead of generating an appeal I decided to try this route instead. In fact, I have already proved that the court in the *Rexburg Decree* made one mistake with the JJ Miller decree—the location. I never argued that I thought an accomplished transfer had been made between JJ Miller's original homestead and his second homestead, where I live today. I argued that this was clearly a clerical error, and Special Master Bilyeu agreed in section 5 B of her Findings of Fact and Conclusions that "this court may recognize the legal description for the second (homestead) under I.R.C.P 60 (a) which allows corrections of clerical errors." Considering location, along with priority and volume, being the primary functions of the decree, a person would think that the court would have looked closely to make sure this was correct. Certainly by the time the *Rexburg Decree* was issued, the Fremont County courthouse would have had the information about where JJ Miller currently lived and homesteaded since the documents were filed there. And certainly, they had Mr. Miller's Notice of a Water Right, filed there at the Fremont County courthouse on May 23, 1901. I see two blunders in execution here: one blunder was to fail to use a current map or other information with JJ Miller's current homestead, some 9 years after Mr. Miller had filed the proper paperwork in that same courthouse. The blunder was not, as Special Master Bilyeu suggested, in the execution of writing the correct place of use instead of the incorrect, but in not using all the current legal information available to them. The other blunder was to fail to use and apply Mr. Miller's Notice of Water Right, filed in that same courthouse May 23, 1901. In the same way the clerk failed to use Mr. Miller's current homestead for the location, they failed to use Mr. Miller's correct priority date as well. Both are errors, made by the court, who failed to look up or find any pertinent information concerning JJ Miller's place of use or the priority date. Is there any scrap piece of evidence on the record or not which suggests or supports any other theory? There are none. Other major clerical errors were made on Paradise Springs that have been or are being dealt with by SM Bilyeu, including assignment of HC Bowles water (22-180) to land owned by Withrich and including not assigning a place of use or numerical rate to the Withrich right. For a small creek with only 3 legitimate homestead rights, having this many mistakes highly suggests that the nature of the errors was clerical.

Special Master Bilyeu also considered that some deal might have been worked out that Mr. Miller would have subordinated his actual priority date for 6/1/04. This can't be true either, because all the available evidence suggests the contrary. Samuel Kunz, who testified on Mr. Miller's behalf at

the Rexburg Decree, was JJ Miller's neighbor and father in law. Samuel Kunz was a polygamist, known to have at least three wives including Caroline Withrich. His daughter from another union, Clara Kunz, became Clara K Miller, JJ Miller's wife. Samuel Kunz testified that Ms. Withrich hadn't been able to get water from the Spring until the dam was completed, in June of 1904, but he did not make such a statement about Mr. Miller. He did explain that Mr. Miller was already irrigating about 9 acres at the time of the testimony, 1905. There would be no reason to try to make any deals about priority dates with his daughter and son in law, and in fact Samuel Kunz neither testified about any deals nor made any priority date deals with his daughter and son in law. Samuel Kunz never stated what he thought was JJ Miller's priority date, which surely he would have done if that had been an issue. George Walton testified that he and JJ Miller worked together on the spring dam and ditches, but made no reference to any deals to subordinate Mr. Miller's priority date or what he thought that date should be. And the question could be asked, why would JJ Miller, who left his previous homestead for the reason of water, and who had done all of the right things to secure his water, why would he need to make a deal? Without any shred of evidence of any kind of deal, and with the preponderance of evidence pointing towards the fact that the Fremont County Court made more than one mistake that day regarding Paradise Springs and the JJ Miller right, I can comfortably conclude that the Fremont County Court Clerk erred more than once on the JJ Miller decree. Once was the place of use, and the other was the date of priority. To conclude otherwise defies logic, truth, and the evidence we have.

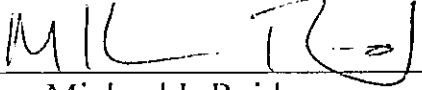
CONCLUSION

It appears that due either to my lack of experience, or my outright incompetence, I failed to explain that the accomplished transfer I was arguing for at the trial and in my post trial brief was one that occurred in the late 1960's involving water that IDWR would have otherwise decreed to Rex Miller, water that Roy Miller believed he owned through inheritance. The other accomplished transfer, between JJ Miller's first and second homesteads, I regarded as a clerical error and never intended to argue this as an accomplished transfer. The JJ Miller right, decreed for 2 cfs for 100 acres, is today being used in just that way within the original claimed place of use. The arrangement of lands under which the water services is slightly different than it was before the late 1960's when pumps began to irrigate the upper portions of the JJ Miller homestead, but no more water is being used

than was before and no more acreage is irrigated than what was originally claimed. According to Ex. R-42 and related testimony, whatever water that is more than 1.0 cfs and that IDWR would otherwise decree to Rex Miller is actually owned by Roy Miller and his successors. Since that transfer took place, documented in 1969 by Roy Miller with claim 22-4104, before 1987, did not enlarge the right or injure any other right, this accomplished transfer must be recognized by the court. In recognizing this, claim 22-13503 must be restored and 22-13212 also must be corrected.

In her Order on Summary Judgment, Special Master Bilyeu wrote that the SRBA court has exercised some latitude in using I.R.C.P. 60(a) for correcting errors. The court would not need much latitude in this case to assume that the mistaken priority date was created by a clerical error, especially given the clerical error concerning the place of use and other errors concerning Paradise Springs. John Miller, on May 23, 1901, made a point of taking a trip, 2 days by horse, to file a Notice of Water Right in Fremont County where the *Rexburg Decree* was later decided. He had just abandoned his previous homestead because he could not get any water for irrigation or culinary purposes. Clearly, he knew that he needed to file this notice as soon as possible, because he filed this before he filed his new homestead claim in 1902. *The water was more important to him than the homestead itself.* Mr. Miller did all of the things he was supposed to, only to have his efforts extinguished by a lackluster performance by the Court. Mr. Miller deserves his efforts to be fairly and legally rewarded. The priority date associated with the JJ Miller right has been in error for more than 100 years and now is the time to correct this mistake. The correct priority date for this right is May 23, 1901.

I once again pray for relief from Mr. Budge and the objectors and urge Special Master Bilyeu to reconsider and rule in favor of the truth.


Michael L Reid date 6/6/2010

I certify service of copies to the following:

TJ Budge, Attorney for the objectors
IDWR Document depository