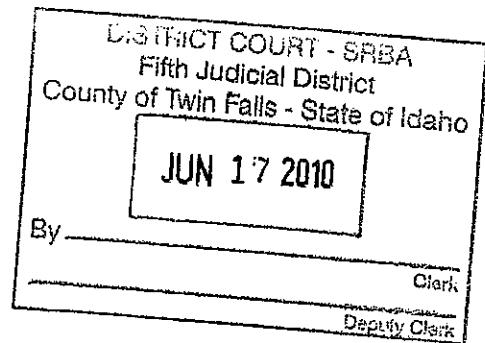


RECEIVED
JUN 18 2010
DEPARTMENT OF
WATER RESOURCES



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

	)	Subcases
	)	75-14090 (Sneed)
In Re SRBA	)	75-14092 (Gooby)
	)	75-14093 (split)
	)	75-14512 (Odell)
	)	75-14513 (Barinaga / Williams)
	)	75-14100 (Waite)
Case No. 39576	)	75-14302 (Bourdon / Vera M. Hartley Trust)
	)	
	)	ORDER DENYING MOTIONS TO ALTER OR
	)	AMEND

Findings of Fact

Special Master Report and Recommendation

The *Special Master Report and Recommendation* was entered on April 27, 2010, recommending several of the claims – particularly those filed by Dale F. Gooby and Jeffrey V. Waite – be decreed for less than recommended by IDWR. Mr. Gooby's claim (75-14092) was recommended by IDWR for .19 cfs to irrigate 9.7 acres, but after trial, the Special Master recommended the claim for .12 cfs to irrigate 6.1 acres. Mr. Waite's claim (75-14100) was originally recommended by IDWR for .12 cfs to irrigate 6 acres but was amended at trial for .45 cfs to irrigate 22.5 acres. The Special Master recommended his claim for .41 cfs to irrigate 20.3 acres.

Motions to Alter or Amend

Gooby

Mr. Gooby filed his *Motion to Alter or Amend* in subcase 75-14092 on May 19, 2010, stating:

It was never made clear at the hearing that lines drawn on the map by Bill Maxwell would become the quantitative basis by which place of use would be determined. . . . I did not understand it would be used as the basis to deny irrigated lands where Idaho Department of Water Resources, using aerial photography and field investigations, clearly and accurately identified and quantified the place of use.

Mr. Gooby attached to his *Motion* an affidavit by Bill Maxwell who wrote: On September 30th, 2009, during a hearing on Dale Gooby's and other Wallace creek water right claims, I was asked to mark on an aerial photo the areas that I considered to be currently irrigated. . . . After reviewing higher quality Aerial Imagery than that presented at the hearing, I would agree that the original irrigated area recommended by IDWR January 11th, 2007 was reasonably accurate.

Waite

Mr. Waite filed his *Motion to Alter or Amend* on May 24, 2010, in all seven of the above subcases. He asked the Court to withhold entry of any partial decrees "pending the disposition of the two private party civil lawsuits filed by lower Wallace Creek water users against upper Wallace Creek water users." Mr. Waite suggested the reason for the lawsuits is extensive damage on properties owned by Farley, Shefts, McClain/Wong and Waite "due to water waste and overwatering within the Upper Wallace Creek use area."

Mr. Waite also asked the Court to withhold entry of partial decrees "until IDWR can submit photo documentation in support of Mr. Bill Maxwell Junior's testimony that would override the photo documentation that I have provided as evidence to the contrary . . . evidence that clearly controverts Mr. Maxwell Junior's testimony." He then went on to re-state many of the arguments he made during trial.

Western Watersheds Project

On May 28, 2010, Larry Zuckerman, Central Idaho Director of the Western Watersheds Project in Salmon, Idaho, filed a *Motion to Alter or Amend* on behalf of Western Watersheds in all seven subcases. In a letter attached to the *Motion*, Mr. Zuckerman wrote that Western

Watersheds was a party to the SRBA and it was filing the *Motion* “because some of the water usage and water rights, as recommended by IDWR and the Special Master, “are not in the local public interest, because it is greatly expansive from the historic use, and because some of the diverted water is not being put to beneficial use as required by Idaho Water Law” He then described waste water causing such injuries as mass soil movements, severe erosion and natural resource damage on public and private lands and conservation easements held by the Idaho Department of Fish and Game on Lower Wallace Creek.

Hearing

All three *Motions to Alter or Amend* were heard on June 10, 2010, at the SRBA Courthouse in Twin Falls, Idaho. Messrs Gooby, Waite and Zuckerman appeared *pro se*; Milton A. “Jock” Slavin appeared for Dan F. Farley; Robert H. Wood appeared for Linda Barinaga and Dick Williams and Greg and Sandy Bourdon / Vera M. Hartley Trust; and Garrick L. Baxter appeared for IDWR, along with Monica P. Van Bussum and Suzie Cooley-Denney.

Discussion

The core of all three *Motions* suggests the Court should re-open the proceedings for further evidence, particularly concerning the testimony of William R. Maxwell whose parents once owned the Sanderson Homestead from which most of the claims derive. As noted earlier, Mr. Maxwell testified about the irrigated acreage on each claim, including those already partially decreed. During his testimony, he outlined on IDWR Exhibit 3 (enlarged 1987 aerial map) the areas he considered were being irrigated by each of the claimants.

The Special Master again listened to the recorded tapes of Mr. Maxwell’s testimony and found no inconsistencies with the summary of Mr. Maxwell’s testimony in the *Report and Recommendation*. If anything, the tapes confirm that “Ms. Van Bussum’s expertise in mapping, together with Mr. Maxwell’s knowledgeable and impartial testimony, presented the best evidence available of the current irrigable acreage.” *Report*, at 6.

Mr. Maxwell testified only his parents’ land was being irrigated from the Sanderson Ditch (also called the Montgomery Ditch and Upper Wallace Creek Ditch) when his parents bought the homestead in 1951. He guessed that some of the homestead could have been irrigated

as early as 1923, because the ditch was connected with a placer claim 1½ miles beyond the homestead.¹ He described the land as “rugged” and his family gradually developed the various irrigated parcels over the 28 years they owned the land.

Mr. Maxwell said that the IDWR Exhibit 3, with Ms. Van Bussum’s outlines, was a reasonable representation of the irrigated land despite some aerial distortion. He had no dispute with IDWR’s recommendations.

Conclusions of Law

Rules governing motions to alter or amend under SRBA Administrative Order 1, Rules of Procedure, 13a, and I.R.C.P. 52(b), suggest two grounds for granting the *Motions* filed by Messrs Gooby and Waite and Western Watersheds: 1) to correct a manifest error and 2) newly discovered evidence. Those same circumstances were addressed by former-SRBA Presiding Judge Barry Wood on December 29, 1999, in his *Order on Challenge*, subcases 36-2708, *et al.* In that *Order*, Judge Wood wrote:

In regards to considering whether to amend the findings on the basis of a manifest error, the trial court considers only the evidence contained in the record. In regards to a motion to amend based on newly discovered evidence, the movant may not introduce evidence that was available at trial but not proffered. Further, it is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court.

Lastly, and of significance, is that the determination of whether to grant or deny a motion to amend findings of fact or a judgment is left to the discretion of the trial court (special master) and is therefore reviewed under a “manifest abuse of discretion standard.” As such, to the extent a special master disallows new evidence in conjunction with a motion to alter or amend brought pursuant to AO1 § 13(a) on the grounds that the proponent is seeking to advance a new legal theory or introduce evidence that was otherwise available at trial, there can be no manifest abuse of discretion. Simply stated, the Rule does not provide a mechanism for advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow a brand new party to the subcase to step forward for the first time and have a new trial [citations omitted].

Order on Challenge, at 21.

¹ During Mr. Maxwell’s testimony, Mr. Waite said that the ditch was called the Sanderson Ditch in a 1918 Forest Service permit.

The above quoted law of the SRBA case disposes of all three *Motions to Alter or Amend*. Whether the *Motions* are based on a claim of manifest error or sought to introduce newly discovered evidence, they must fail. Neither can they reassert arguments already rejected by the Special Master. There is no suggestion the “higher quality Aerial Imagery” considered by Mr. Maxwell *after* the trial was not discoverable during the pendency of the action or was unavailable at trial. In addition, as asserted by counsel for Mr. Farley, it would not be fair for the Court to consider evidence or testimony not subject to cross examination by all parties.

The *Motion* filed by Mr. Zuckerman on behalf of Western Watersheds posed additional hurdles because he is not an Idaho attorney – hence, unable to represent a corporation – and Western Watersheds is a brand new party to the subcases stepping forward for the first time after trial. In either event, the Court has no other choice than to deny Western Watersheds’ *Motion* regardless of the merits of the allegations.

On the matters of the “two private party civil lawsuits” mentioned by Mr. Waite in his *Motion* and environmental damage alleged by Western Watersheds, it is worth noting the Idaho Supreme Court has held the SRBA Court has exclusive jurisdiction to determine the elements of water rights within the scope of the general adjudication:

It is clear from the Idaho statutes governing general adjudications and SRBA that the legislature contemplated a single adjudication of claims within the scope of a general adjudication. . . . Thus, once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only.

Walker v. Big Lost River Irr. Dist., 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

It is equally clear that the SRBA Court lacks jurisdiction to examine into damage caused by the use of water rights. For example, if an irrigator allows his or her water to flood another’s property or a public roadway, the aggrieved parties must seek redress in a court other than the SRBA District Court.

Order

THEREFORE, IT IS ORDERED that the *Motions to Alter or Amend* filed by Messrs Gooby and Waite and Mr. Zuckerman on behalf of Western Watersheds are **denied**.

DATED June 17, 2010


TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTIONS TO ALTER OR AMEND was mailed on June 17, 2010, with sufficient first-class postage to the following:

DICK WILLIAMS
GREG BOURDON
LINDA BARINAGA
SANDY BOURDON

Represented by:

JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

GREG BOURDON
VERA M HARTLEY TRUST
59 SAVAGE RANCH RD
SALMON, ID 83467
Phone: 208-756-8315

MICHELLE SNEED
RUSSELL SNEED
9449 PERSHING AVE
ORANGEVALE, CA 95662

DAN F FARLEY

Represented by:

MILTON A. SLAVIN
ATTORNEY AT LAW
116 N CENTER ST.
SALMON, ID 83467
Phone: 208-756-2030

WESTERN WATERSHEDS PROJECT
LARRY ZUCKERMAN, CENT ID DIR
PO BOX 1322
SALMON, ID 83467
Phone: 208-756-8000

JEFFREY V WAITE
PO BOX 75
CARMEN, ID 83462
Phone: 208-303-0153

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

DALE F GOOBY
18 SAVAGE RANCH RD
SALMON, ID 83467
Phone: 208-756-2397

DAVID JEFFREY ODELL
2742 ALPENGLOW RD
STEVENSVILLE, MT 59870

DAVID YANOFF
343 DIAMOND CREEK RD
SALMON, ID 83467-5298
Phone: 208-756-2248

ORDER

Page 1 6/17/10

FILE COPY FOR 00172 Deputy Clerk

