

Dale Gooby:
18 Savage Ranch Road
Salmon, ID 83467
July 17, 2010
Pro Se:

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

In Re SRBA	)	Subcase 75 14092 (Gooby)
	)	
	)	
	)	
Case No. 39576	)	
	)	OPENING BRIEF FOR
_____	)	SUBCASE 75-14092

Statement of the Case

In the early to mid 2000's, I was approached by Bob Foster (IDWR) to review the property that I was claiming as irrigated under the SRBA. I met with Bob on the property and we reviewed and mutually agreed on the boundaries that he was marking on his aerial photo to be used in the recommendations for water rights. I had recently installed a new delivery system to the property since the old system had fallen into an unsalvageable state of disrepair by the former owners. The area to be irrigated was easily identifiable.

I received a letter from IDWR dated January 10, 2007 with attachments showing the place of use that IDWR was going to recommend to the SRBA court. I reviewed the enclosed material and could easily determine that it was in fact the area that Bob Foster and myself had reviewed during his field investigation. The area was correct and I was satisfied with the recommendation.

I received a letter dated July 17, 2008 setting the date for an initial hearing for September 10, 2008 to be heard in front of Special Master Terrance A. Dolan. This was due to protests filed by Dan Farley and Jeff Waite stating only that "this water right should not exist". This hearing was very short since I believe the Special Master had listened to the Farley/Waite presentation on several other water right claims in our subdivision and concluded that it would go to a hearing unless I conceded my water right claim. It should be noted that the protests were ont concerned with the quantity or place of use, only whether or not the water right existed.

This was not an oversight on Mr. Waite's part because he specifically filed an objection on sub case 75-14302, objecting to quantity and place of use.

A trial was held on September 30, 2009 on these objections. Many hours of testimony were provided at this trial most of which was incoherent and conflicting. The testimony of interest in my case was given by Mr. Bill Maxwell. At that time, IDWR unfurled a gigantic, greenish, brownish, blackish printout (IDWR Exhibit 3) of what appeared to be an aerial photo. This printout came from what I believe to be the 1 meter resolution, 1987 aerial photography that was used for the initial recommendations mapping. Keep in mind that this approximately 4 foot by 5 foot aerial photo printout only covered about a hundred acres. So at 1 meter resolution the pixels were very large, leading to little detail. The Court then asked Mr. Maxwell to mark on the aerial, areas that he considered to be irrigated. Mr. Maxwell took about a minute and drew out several areas on the exhibit. I admit that I have a great deal of experience working with aerial photography and I could not convince myself whether or not the lines drawn on my property by Mr. Maxwell were accurate or not. There was no scale on the map and the resolution was so poor that there were no definitive landmarks. However, I was not concerned with Mr. Maxwell's delineation since neither IDWR, Farley nor Waite had contested the place of use or the quantity. Since I was in complete agreement with IDWR's recommendations, I was reasonably confident that this recommendation would be decreed.

I received a letter dated April 4, 2010 which was a Request for Suggestions RE: Draft Special Master Report and Recommendation. The letter states "Ms. Van Bussum's expertise in mapping is sufficient to support the irrigated acreage and quantities recommended by IDWR for the five claims. Mr. Maxwell's testimony, certainly supported her findings and give them prima facie weight, the claims should be partially decreed as such". This is what was right and what I expected all along. I was now very confident of the outcome.

I received the Order Granting Motion to Amend Claim 75-14302 and Special Master Report and Recommendation dated April 27, 2010. To my utter disbelief I found that the court had reduced my irrigated acreage by about one third. I figured this must be an administrative mistake so I called Garrick Baxter, the attorney for IDWR to find out who I had to contact to fix this error. He said that my only possible recourse was to file a motion to alter or amend with the court. Although this was the first time I had ever been informed of these changes in the flow and acreage figures, my opportunity to have them corrected had passed. I immediately went to IDWR's website and pulled up the recommendations and looked at the GIS delineation for the place of use. I called up Garrick Baxter again and asked where that delineation came from. He said it was from the lines that Mr. Maxwell drew on the map. He emailed me a scanned version of IDWR Exhibit 3. Sure enough the geometry was almost exact.

The draft recommendation sent on April 5, 2010 stated: "Ms. Van Bussum's expertise in mapping is sufficient to support the irrigated acreage and quantities recommended by IDWR for the five claims. Mr. Maxwell's testimony certainly supported her findings and given their prima facie weight, the claims should be partially decreed as such. While Mr. Maxwell was not identified as a mapping expert, the boundaries he marked on IDWR Exhibit 3 should help MS. Van Bussum pinpoint the location and number of acres she now recommends. That includes the additional acreage she would now recommend for the Bourdon/Vera M. Hartley Trust claim (75-14302) if the Court were to allow the claim to be amended. Given these facts, a motion to amend the claim is clearly warranted, particularly because the amended claim is less than the original claim". Wouldn't this have been a good time to state that the Court intended to amend claim 75-14092 to reduce the acreage by one third? This would make sense for claim 75-14302 since it was actually protested on quantity and place of use. My recommendation wasn't protested based on place of use or quantity yet these elements were amended.

I'm a civil engineer that works with GIS and AutoCad on a daily basis. I know what was required of Ms Van Bussum to take Mr. Maxwell's testimony and turn it into an electronic quantitative basis for determining place of use and quantity. She really had a couple of choices. She could either freehand "wing it" and attempt to roughly duplicate the geometry of Mr. Maxwell's drawing while digitizing inside my property boundaries, or she could digitize the geometry and scale it so that it fit inside my property boundaries. What is important is, that she went from using her expertise in mapping in conjunction with Mr. Maxwell's testimony to make the delineation to just using Mr. Maxwell's testimony to make the determination. I was comfortable with Ms. Van Bussum's expertise and was confident that it would override any inconsistency provided by Mr. Maxwell's testimony. Ms. Van Bussum drew new lines across green (irrigated) areas in order to fit Mr. Maxwell's rendition of what he thought was irrigated on the digital aerial photo. If you have a green area (irrigated) enclosed in a brown area (nonirrigated area), the delineation is fairly straight forward on an aerial photo. I have no idea why Ms Van Bussum decided to abandon her mapping expertise and rely solely on fitting an odd shaped polygon into an area that it clearly doesn't fit.

I filed a motion to alter and amend with the court. The motion was heard on June 10, 2010. I stated my case to Special Master Terrance A. Dolan. I presented him with an affidavit signed by Mr. Maxwell that the delineation that he drew on my property to represent what he thought was currently irrigated was incorrect. I showed Mr. Maxwell a high quality printout of the 1987 aerial photography with IDWR's original recommendations and the delineation created by Ms. Van Bussum to represent the delineation provided by Mr. Maxwell at trial on IDWR Exhibit 3. He agreed that the delineation he provided was incorrect and that IDWR's original recommendation was correct and he willingly signed an affidavit to that effect. At the hearing, the Special Master asked Garrick Baxter for his opinion on Mr. Maxwell's testimony. Mr. Baxter stated that he felt if Mr. Maxwell's testimony was incorrect that the recommendation should default to the original recommendation.

I received the Order Denying Motions to Alter or Amend dated June 17, 2010.

Statements of Facts

IDWR used the 1987 aerial photography to make its original recommendations concerning quantity and place of use. That photography clearly supported the original recommendation of 0.19 cfs to irrigate 9.7 acres on my property.

If the recommendation had not been protested by Farley or Waite, it would have been partially decreed at 0.19 cfs to irrigate 9.7 acres. This is assumed based on the fact that all parcels in this case that were not protested were partially decreed as recommended.

My recommendations were protested solely on the basis whether or not the water right existed. The quantity and place of use was never an issue. That means that the protest was based on all or nothing. The Court came to the conclusion based on the testimony that the water right existed.

The current recommended quantity of 0.12 cfs for 6.1 acres was never made available for review. The only time this information was presented by the Court was after it was partially decreed.

The current recommendation of 0.12 cfs for 6.1 acres is based solely on the testimony given by Mr. Bill Maxwell.

Ms. Van Bussum's "expertise in mapping" was not used for the current recommendation. The delineation for the current recommendations clearly divides homogeneous areas. From a mapping standpoint, there is no reason to draw the delineation where it is currently drawn. The delineation excludes areas that are clearly no different in color(vegetation), slope, soils, etc. than the area that is included. It should be noted that I understand the phrase "expertise in mapping" to mean, at a minimum, that the mapper can distinguish the difference between green (irrigated) and brown (nonirrigated) and has the ability to produce a definite boundary (digitized polygon) between the two.

Mr. Maxwell signed an affidavit stating that his testimony was incorrect as it relates to accurately delineating the irrigated area on my property on IDWR exhibit 3.

I was never made aware of the Court's intention to amend my recommendations, or to what extent it would be amended until after it was partially decreed.

Arguments

Nobody ever contested my water right claim based on quantity or place of use and therefore it should never have been subject to such a review by the Court.

By virtue of where the current recommendation delineation is drawn, it is evident that the Court used Bill Maxwell's testimony as the sole basis for determining quantity and place of use. The Court upheld this decision even though they have a signed affidavit from Mr. Maxwell stating that the delineation that he provided was in fact, in correct.

The Court provided a draft recommendation requesting comment. In that solicitation for comment they never provided the new place of use or quantity that was being proposed by IDWR. To make matters worse they said that they were going to decree the recommendations of 0.19 cfs for 9.7 acres that was recommended by IDWR. From the Draft Recommendation dated April 5, 2010 on page 6 it stated as follows: "Ms. Van Bussum's expertise in mapping is sufficient to support the irrigated acreage and quantities recommended by IDWR for the five claims. Mr. Maxwell's testimony certainly supported her findings and given their prima facie weight, the claims should be partially decreed as such. While Mr. Maxwell was not identified as a mapping expert, the boundaries he marked on IDWR Exhibit 3 should help Ms. Van Bussum pinpoint the location and number of acres she now recommends. That includes the additional acreage she would now recommend for the Bourdon/Vera M. Hartley Trust claim (75-14302) if the Court were to allow the claim to be amended. Given these facts, a motion to amend the claim is clearly warranted particularly because the amended claim is less than the original claim. For the above reasons, the claimants are entitled to partial decrees adjudicating the water rights as recommended by IDWR and as described in the attached Special Master Recommendations for Partial Decrees for Water Rights 75-14090 (Sneed), 75-14092(Gooby), 75-14513 (Waite), 75-14302 (Bourdon/Vera M. Hartley Trust), 75-14512(Odell) and 75-14513 (Barinaga/Williams)." There was no attachment.

There is no reason on earth why I would expect any decree other than the one based on the original recommendation. The Court said in the draft that was the way they would rule. They specifically pointed out in the draft that the right 75-14302 was going to be amended, while making no mention of amending my recommendation. I was in fact not surprised that water right 75-14302 was proposed to be amended because, unlike my claim, it was being protested based on quantity and place of use. There is no way I could have known that this was the Court's intention until reading the partial decree judgment that had amended it to 0.12 cfs for 6.1 acres.

Conclusion

If you can assume consistency with my recommendations and others from the same parent water right, it would have been decreed as originally recommended if it had not been protested.

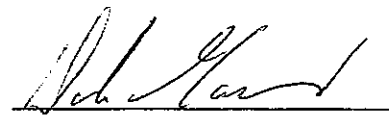
Nobody, including IDWR, the other associated water right holders, the protestors, or myself ever contested the quantity or place of use of my original water right recommendations. It may well be within the Courts right to take exception to the elements of the recommendation, but in this case, nobody ever requested them to do so.

The Court put over riding weight on Bill Maxwell's testimony to establish an amended recommendation. I know this because the current polygon that delineates the place of use is virtually identical in shape to the one that Bill Maxwell drew. The delineation intersects areas that are obviously irrigated by their green color, and other than trying to recreate Bill Maxwell's delineation, there is no reason to draw the line there.

Bill Maxwell's testimony as it pertains to me is directly refuted by Bill Maxwell himself. That being the case, it is no longer relevant as evidence to establish quantity and place of use for my recommendation and subsequent partial decree.

I ask the Court to re-amend my partial decree back to the original recommended quantity of 0.19 cfs for 9.7 acres because it is the amount that is supported by all of the current credible evidence.

Dated: July 17, 2010



Dale Gooby: Pro Se
18 Savage Ranch Road
Salmon, Id 83467

CERTIFICATE OF MAILING

I certify that on July 19, 2010, I mailed the original and copies of this OPENING BRIEF FOR SUBCASE 75-14092, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

Director of IDWR
IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

Dick Williams
Greg Bourdon
Linda Barinaga
Represented by:
Jerry R. Rigby
25 N. 2nd E.
PO Box 250
Rexburg, ID 83440-0250
Phone: 208-356-3633

Dan F Farley
Represented by:
Milton A. Slavin
Attorney at law
116 N. Center St.
Salmon, ID 83467
Phone: 208-756-2030

Jeffrey V. Waite
PO box 75
Carmen, ID 83462
Phone: 208-303-0153

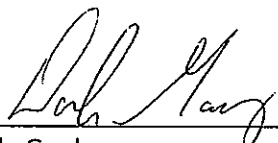
David Jeffrey Odell
2742 Alpenglow Rd
Stevensville, MT 59870

David Yanoff
343 Diamond Creek Rd
Salmon, ID 83467-5298
Phone: 208-756-2248

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

Wester Watersheds Project
Larry Zuckerman, Cent Id Dir
PO box 1322
Salmon, Id 83467
Phone: 208-756-800


Dale Gooby
18 Savage Ranch Rd
Salmon, ID 83467