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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 30 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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION; FINDINGS OF
Case No. 39576	)	FACT AND CONCLUSIONS OF LAW
	)	
	)	WATER RIGHT NOS.: 22-13212 and
	)	22-13503

I. PROCEDURAL BACKGROUND

This Court issued *Findings of Fact and Conclusions of Law and Request for IDWR to Calculate Acreage* on May 28, 2010. The *Findings of Fact* generally concurred with IDWR's recommendation for 22-13212 and with disallowing 22-13503. The *Findings of Fact* asked IDWR to calculate half of the marshy area shown on Exhibit 18. On June 21, 2010, IDWR calculated the marshy area shown in red on Exhibit 18 to be 1.6 acres. Half of that amount is 0.8 acres. IDWR calculated the acreage of water right 22-13212 at 5.3 acres. The Court agreed in large part with IDWR's determination of a 5.3 acre maximum, but determined that the acreage should be reduced by half of the amount of the marshy area shown on Exhibit 18. A reduction of the 5.3 acres by the .8 acres is a total of 4.5 acres. Consequently the total acreage recommended is 4.5 acres. This *Special Master's Report and Recommendation* makes only that change and corrects a typographical error on P. 9. (correcting a reference to 22-13509 to correctly refer to 22-13503.)

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.* (6th 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*.

The Objectors argued that Mr. Reid is not entitled to any portion of 22-405. They argued that J.J. Miller’s place of use in the *Rexburg Decree* did not include Mr. Reid’s property. The Objectors asserted that the *Director’s Report* recommended the Reid water right incorrectly, utilizing Idaho Code § 42-1427 to change the place of use. Furthermore, they asserted that Mr. Reid is not entitled to part of 22-405 because he cannot establish water use earlier than July 21, 1969. Objectors made this same argument on summary judgment. However, the *Order on Summary Judgment* denied Objectors’ *Motion* because genuine issues of material fact remained for trial.

The trial focused on Mr. Reid’s claim to part of 22-405 from the *Rexburg Decree*. The trial also focused on the total acreage of the water right and on the time water was first used on Mr. Reid’s land.

II. STANDARD OF REVIEW

A. Director’s Reports

Director’s Reports of water claims are *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). The objecting party has the “burden of going forward” with evidence to establish any element which is in addition to or inconsistent with the description in the *Director’s Report*.

B. Accomplished Transfer Statute

The accomplished transfer statute, I.C. § 42-1425, allows certain changes to water rights even if the changes violate the mandatory transfer procedures. The statute establishes:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to

which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement to the original right.

I.C. § 42-1425(2).

The statute allows water users to claim water rights with changes to the allowable elements if three prerequisites are met:

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.* (6th 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.

B. Place of Use

IDWR determined that there was a valid connection between J.J. Miller's right and Mr. Reid's land, even though the *Rexburg Decree* did not include it in the place of use. The *Rexburg Decree* described J.J. Miller's place of use as T4N R45E S80 SWSE and S½ of SW¼ and T4N R45E S80 NENW containing 160 acres. (IDWR Ex. 13 p.173) IDWR conducted topographic analysis showing that J.J. Miller's land described in the *Rexburg Decree* was impossible to irrigate from Paradise Springs in 1904. (IDWR Exhibit 14, *Rexburg Decree* land in green, Reid land in black) Senior IDWR Agent Michael Holliday testified that it was impossible to deliver water from Paradise Springs to the place of use in the *Rexburg Decree* for two reasons. First, the water would have to travel from ½ mile to 1½ miles to reach the described place of use. Second, water would have to travel uphill from the point of diversion. Mr. Holliday concluded that in 1904, Paradise Springs could not have irrigated J.J. Miller's described land. There was no evidence introduced at trial to contradict the impossibility of irrigating the described place of use. IDWR concluded the place of use described in the *Rexburg Decree* was incorrect. (Testimony of Michael Holliday)

IDWR learned that J.J. Miller had homesteaded a second parcel of land which could be irrigated from Paradise Springs. Mr. Reid owns part of this second property. IDWR looked at whether water was historically used on J.J. Miller's second property in the E½ of NW S30 and E½ SW S19. Mr. Reid and additional SRBA claimants have claimed from J.J. Miller's right at this second place of use. No parties to the SRBA have claimed from the first decreed property. (Testimony of Michael Holliday)

The *Director's Report* therefore recommended 5.3 acres on the Reid property based on an

accomplished change relocating the place of use described in the *Rexburg Decree* to J.J. Miller's second property in the E ½ of NW S30 and E ½ SW S19. This second property included Mr. Reid's land. IDWR determined that the decreed place of use was not irrigated from Paradise Springs. IDWR concluded that the water was always used on the second homestead to irrigate a small portion of Mr. Reid's land. IDWR utilized the Accomplished Transfer Statute I.C. § 42-1425 to correct the legal description. (Testimony of Michael Holliday)

C. Acreage

IDWR originally recommended 35.6 acres to Mr. Reid in the first *Director's Report*. (IDWR Exhibit 11) However, IDWR later revised its recommendation. Based on topography, location of 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*, on its opinion of the topography of Mr. Reid's land, the point of diversion, witnesses in the area, historic photography and documents, and visits to the place of use. He had to rely on the contour lines and topography to estimate the acreage. Based on witness accounts, a topographic analysis, and a field exam, IDWR recommended 5.3 acres for this water right.

1. Marshy Area

Within the 5.3 acres recommended by IDWR was a marshy area depicted in red on IDWR Exhibit 18. Mr. Holliday identified the area as marshy because red shows growing vegetation. A harvested crop shows as a white area. Objectors argued the red area is entirely marshy and was not irrigated. In Mr. Holliday's opinion, the red area was marshy in 1960 and 1987. Mr. Holliday characterized the red area as partial wetland. (Exhibits IDWR 18, C-30)

In contrast, Mr. Reid testified that the red area is not swampy wetlands. He says some auxiliary flow from the current pump makes the surrounding land wetter than other land. Mr. Reid said that about half of the red area can be cultivated. He observed crops grown in that section of the property in 1996, 1997, 1998, and 1999. (Testimony of Michael Reid)

D. Priority/Water Usage

One of the key issues at trial was whether water was used on Mr. Reid's property in the early 1900s as recommended, or whether water was first used in 1969. The Objectors asserted that water was not used on Mr. Reid's property until 1969. If water was not used until 1969, Objectors note that J.J. Miller's 1904 water right should not attach to Mr. Reid's land. The Objectors urged the court to find that water was used on the land for the first time in 1969. This position was based on documents and witness testimony. Objectors offered a Statutory Claim to a Water Right (Exhibit C-

1) which was filed by Mr. Reid's predecessors LeRoy and Ruth Miller. The statutory claim sought a priority date of June 1, 1904, based on the *Rexburg Decree* and showed 8 acres being irrigated. However, the location is north of Mr. Reid's land. Objectors pointed to the Notice of Water Right showing the proposed canal going north. (Exhibit C-19) This statutory claim had a 1904 priority date and was for 8 acres. The statutory claim was located north of Mr. Reid's land. (Exhibit C-19) However, J.J. Miller would have to go south to irrigate all the land he described on Exhibit C-19. Objectors also asserted that the 1969 priority is consistent with a Notice of Water Right asserting a priority date of July 21, 1969. (Exhibit C-3) The Notice of Water Right covered all of Mr. Reid's land. This position was supported by the testimony of Larry Kunz and Todd Dustin.

Larry Kunz has farmed and lived all of his life near Paradise Springs. He lives near Mr. 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 south of Paradise Springs. (Testimony of Rex Miller)

E. Duplicate Claims

Michael Reid claimed both water rights 22-13212 and 22-13503 on Paradise Springs for his 35.6 acres. The basis for the two separate claims was not made clear at trial. The *Director's Report* disallowed one of the rights.

If the two claims are duplicate claims for J.J. Miller's water right in the *Rexburg Decree*, it is clear that a court cannot issue two decrees for the same water right and must disallow one of the claims. This court has tried, therefore, to discern whether there is another explanation for the filing of two claims. Michael Reid made a brief reference to other water rights from the *Rexburg Decree* called the "Withrich" right and the "Walton" right. The court is not certain whether Mr. Reid asserts that one of these claims is based on the "Withrich" or "Walton" right. If Mr. Reid asserts that his claim was derived from the "Withrich" or "Walton" rights, the court would need evidence of how these rights were decreed in the *Rexburg Decree* and a clear connection to his claim. Although Mr. Reid made some references to the "Withrich" and "Walton" rights, the record lacked evidence of how those rights were decreed in the *Rexburg Decree*. In the absence of evidence or a theory connecting Mr. Reid's claims to the "Withrich" or "Walton" rights, the court cannot decree a right based on the "Withrich" or "Walton" rights. The court next looked to the *Director's Reports*, testimony of IDWR, and evidence presented by the parties.

The two claims appear to be duplicate claims for the same water use from the J.J. Miller right. Accordingly, the *Director's Reports* appropriately disallowed one of the rights, 22-13503, and

recommended the right under 22-13212.

F. 22-13503 Disallowed

A *Partial Decree* for 22-13503 was issued November 24, 2008. A *Motion to Set Aside Partial Decree* was filed which allowed the court to consider this right at the same time as 22-13212.

The *Director's Report* recommended the right be disallowed because IDWR recommended a portion of the J.J. Miller right under right 22-13212. IDWR determined that Mr. Reid did not have sufficient facts for claiming 22-13503 on a different basis.

Mr. Reid did not present "substantial evidence" to rebut the *Director's Report* recommendation of disallowance. If Mr. Reid asserts entitlement to a portion of the "Withrich" or "Walton" rights from the *Rexburg Decree*, those portions of the decree would need to be in the record for the court to evaluate. No such evidence was offered. In addition, there was insufficient showing of how Mr. Reid's claim was connected to those water rights. For example, there was no 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 22-13503.

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 element if: 1) the change was made before November 1987; 2) No water rights existing on the date of change were injured; and 3) the change did not result in an enlargement.

IDWR determined that the place of use described in the *Rexburg Decree* was incorrect because it was impossible to irrigate. IDWR determined that a second parcel homesteaded by J.J. Miller was the correct place of use. IDWR utilized the accomplished transfer statute to recognize the correct place of use. The evidence supports that conclusion. The change from the incorrect place of use to the correct place of use occurred when the correct land was irrigated. There was no assertion that other water rights existing at the time were injured. There was no assertion that the change in the place of use resulted in an enlargement of the right. The court finds that the accomplished transfer statute may be utilized to correct an incorrectly described place of use. The court also notes that the impossibility of irrigating the described land supports a finding that the *Rexburg Decree* contained a clerical error in the legal description for J.J. Miller's land. In the alternative to utilizing I.C. 42-1425, this court may recognize the legal description for the second parcel under I.R.C.P. 60(a) which allows corrections of clerical errors. The court finds that Mr. Reid's land is within the corrected place of use.

C. Proper Acreage

The *Director's Report* recommended 5.3 acres of the J.J. Miller water right. IDWR reduced the 35.6 acres claimed by Mr. Reid after it conducted topographic analysis of the place of use.

IDWR found that the diversion on Paradise Springs allowed only 5.3 acres to be gravity irrigated in 1904. This conclusion was based on topographic maps and contour lines showing that the remaining land was impossible to irrigate.

Mr. Reid testified that Paradise Springs is an artesian spring and pointed out a dam that was built in the area in the early 1900s. (Exhibit R-6) These two facts, he argued, allowed land above the contour lines to be irrigated. Mr. Reid presented an intriguing theory about the artesian nature of the springs and about what that might mean for the historical irrigation of the property. However, no expert was qualified at trial to testify about how artesian springs would impact irrigation practices. The court was therefore not convinced that land beyond the 5.3 acres was irrigated from Paradise Springs.

In contrast to the additional acreage sought by Mr. Reid, the Objectors argued that the J.J. Miller right was not used on the Reid property at all. First, they argued that IDWR's 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.

In contrast to the early 1901 date asserted by Mr. Reid, the Objectors argued that water was never used on the Reid land until 1969. Two credible witnesses gave testimony with that view. However, other credible witnesses testified that water was used on the Reid land prior to 1969. Don Miller grew up near his grandfather J.J. Miller and saw irrigation water on the Reid land from the time he was a small boy. He recalled a ditch on the property which followed the contour lines of the land. He testified that a ditch existed during his childhood was later destroyed when a road was built. Craig Kunz's observations of crops growing on the Reid land in the 1950s and 1960s are consistent with irrigation prior to 1969. These witnesses presented testimony consistent with the *Director's Report* determinations and with analysis of the contour lines. These witnesses presented testimony which explains the absence of a current ditch. Accordingly, the court finds that irrigation occurred prior to 1969 on the Reid property.

VI. CONCLUSION

The Objectors disagreed with IDWR's methodology, calling it speculative and theoretical. This court disagrees. Water rights in Idaho are based on the prior appropriation doctrine. The right evaluated here was claimed from the *Rexburg Decree* with a 1904 priority. More than 100 years have elapsed since the date that right was first put to beneficial use. Consequently, this water right is older than any of the parties and older than any of the witnesses. Nevertheless, these old water rights

must be evaluated. Since there are no witnesses to testify about the location of the ditches or place of use in 1904, IDWR evaluated the water right with the evidence available. IDWR started with the *Rexburg Decree* and examined J.J. Miller's right. As a preliminary matter, IDWR determined that the *Rexburg Decree* included the wrong description for J.J. Miller's property. This was determined when IDWR agents observed the described place of use and realized that it was impossible to water it from Paradise Springs. No parties contradicted that conclusion. IDWR learned that J.J. Miller had homesteaded a second parcel of property. They evaluated this second property and determined that part of it could have been irrigated from Paradise Springs. However, they concluded that a much smaller parcel could have been irrigated than was claimed. IDWR analyzed the topography from this second homestead and determined that 5.3 acres could have been irrigated.

Objectors asserted that the recommendation was based on pure speculation. However, the recommendation was based on a prior decree, site visits, topographical features of the place of use, and the testimony of J.J. Miller's descendants and neighbors. Therefore, the court generally concurs with IDWR's conclusions but concludes that a further reduction of .8 acres is appropriate to account for the marshy area in Exhibit 18.

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 of .8 acres should be made for half the area depicted as the marshy area shown in Exhibit 18. Thus the total acreage is 4.5 acres. Water right claim 22-13503 should be **disallowed** as a duplicate claim.

Based on the file and record herein, IT IS RECOMMENDED that the *Motion to Set Aside Partial Decree* be **granted** for water right 22-13503 and that this water right **not be confirmed** in any partial or final decree. IT IS FURTHER RECOMMENDED that water right 22-13212 be **decreed** with the elements as set forth in the attached *Special Master's Recommendation for Partial Decree*.

DATED: July 30, 2010.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

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

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

JUL 30 2010

In Re SRBA)
Case No. 39576)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 22-13212

RECEIVED By _____

AUG 02 2010

Clerk
Deputy Clerk

NAME AND ADDRESS: MICHAEL REID
550 S 450 W
VICTOR, ID 83455

DEPARTMENT OF
WATER RESOURCES

SOURCE: PARADISE SPRING TRIBUTARY: TETON RIVER

QUANTITY: 0.16 CFS

Right Nos. 22-11639 and 22-13212 are limited to a total combined
diversion rate of 0.71 cfs.

PRIORITY DATE: 06/01/1904

POINT OF DIVERSION: T04N R45E S30 SWNENW Within Teton County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-15 TO 10-31	0.16 CFS

PLACE OF USE: Irrigation Within Teton County
T04N R45E S30 SENW 35.6
35.6 Acres Total

Right Nos. 22-11639 and 22-13212 are limited to the irrigation of
a combined total of 35.6 acres in a single irrigation season.
This right is limited to the irrigation of 4.5 acres within the
place of use described above in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.

RECOMMENDATION

JUL 30 2010

Bugelle Silvey
SPECIAL MASTER

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

RECEIVED

AUG 02 2010

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JUL 30 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)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

Water Right(s) : 22-13212
22-13503

On July 30, 2010, Special Master BRIGETTE BILYEU issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED July 30, 2010.


JANET CONNELL
Deputy Clerk

RECEIVED

AUG 02 2010

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JUL 30 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)

Case No. 39576)
_____)

CERTIFICATE OF MAILING

Water Right(s): 22-13212
22-13503

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on July 30, 2010, with sufficient first-class postage prepaid to the following:

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

CEDRON IRRIGATION
CEDRON IRRIGATION LLC
MAHOGANY RANCH HOLDINGS
TETON RAINBOW RANCH INC
TREES INC
WALLY ROTHGEB JR

Represented by:
BUDGE, THOMAS J
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

CERTIFICATE OF MAILING

PAGE 1
07/30/10

CEDRON IRRIGATION
MAHOGANY RANCH HOLDINGS
TETON RAINBOW RANCH INC
TREES INC
WALLY ROTHGEB JR

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
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Phone: 208-232-6101

DON B MILLER
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302
Phone: 303-447-8760

MICHAEL REID
550 S 450 W
VICTOR, ID 83455
Phone: 208-354-8024


JANET CONNELL
Deputy Clerk