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August 20, 2010

Clerk of the District Court
Snake River Basin Adjudication
Post Office Box 2707
Twin Falls, Idaho 88303-2707
Sent Via Fax: 208-736-2121

Re: *Subcase Nos. 22-13212 and 22-13503*
Objectors' Motion to Alter and Amend

Dear Clerk:

Please file the enclosed *Objectors' Motion to Alter and Amend* in SRBA Subcase Nos. 22-13212 and 22-13503. Please call if you have any questions.

Sincerely,



THOMAS J. BUDGE

cc: Service List

TJB:rr
Attachment

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AUG 23 2010

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*Attorneys for Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc.,
Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr.*

**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

Subcase Nos. 22-13212, 22-13503

**OBJECTORS' MOTION TO
ALTER AND AMEND**

Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc., Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr. (collectively, the "Objectors") submit this Motion to Alter and Amend pursuant to SRBA Administrative Order 1, § 13(a).

BACKGROUND

The *Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law* ("Recommendation") relies upon improper assumptions and a flawed topographic analysis to infer that 4.5 acres were flood irrigated from 1904 until 1969, despite a substantial amount of reliable evidence proving otherwise. Tragically, the Recommendation enables the claimant ("Reid") to succeed in his ill-conceived quest to shut down neighboring groundwater rights that were legitimately appropriated before Reid's property first came under irrigation in 1969.

Reid moved to Idaho and purchased his property in 1999. There were no licensed or decreed water rights appurtenant to his property at that time, just a beneficial use claim filed by his predecessor in interest, LeRoy Miller, stating under oath that the property first came under irrigation in 1969. However, Reid discovered that his property was originally homesteaded by

LeRoy Miller's father, J.J. Miller, and that J.J. Miller had obtained a water right with a 1904 priority date (water right no. 22-405) in the Rexburg Decree. Reid assumed that since he owned part of J.J. Miller's homestead, he was entitled to a 1904 priority date even though his property was not actually irrigated until 1969.

On this assumption, Reid made a delivery call asking the Idaho Department of Water Resources (IDWR) to shut off all of his neighbors' groundwater rights which Reid thinks are impacting Paradise Springs.¹ The IDWR has refused to honor Reid's delivery call, since LeRoy Miller's beneficial use claim states that the property was not irrigated until 1969. The IDWR advised Reid that he has no right to make a delivery call unless he can establish an earlier priority date in the SRBA. Thus began Reid's campaign to acquire part of the J.J. Miller right through the SRBA.

ARGUMENT

The Recommendation gives Reid a 4.5 acre portion of the J.J. Miller right. Since Reid needs only one acre with an early priority date in order to curtail his neighbors, the 4.5 acres with a 1904 priority is for him a resounding success—at the expense of justice.

As explained below, the preponderance of the evidence clearly contradicts the conclusion that 4.5 acres of Reid's property have in fact been irrigated since 1904. Further, even if part of Reid's property was irrigation in the early 1900s, it ceased for much longer than five years and was forfeited for nonuse. Therefore, the Objectors respectfully ask the Court to reconsider and the evidence and amend the Recommendation to grant Reid only the 1969 priority date which is all that the preponderance of the evidence supports and all that he is rightly entitled to.

I. The balance of the evidence weighs heavily against Reid's contrived claim that his property has been irrigated since 1904.

As the claimant, Reid "has the ultimate burden of persuasion for each element of [his] water right." Idaho Code § 42-1411(5). This means that Reid "bears both the burden of production as well as the burden of proof as to each element of [his] claimed water right." *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742 (1997). The *Director's Report* was *prima facie* evidence of Reid's water right and was presumed correct until the Objectors produced substantial evidence to rebut the presumption. *Id.* at 746; Recommendation 9. At that

¹ Until Reid moved into the neighborhood, no prior owner had made a delivery call against neighboring groundwater rights or had otherwise asserted a priority date earlier than 1969.

point, it became Reid's independent obligation to come forward with evidence to prove the elements of his water right: "[i]f the presumption is overcome by the objector, then the claimant has the 'ultimate burden of persuasion for each element of the water right.'" *Memo Decision and Order on Challenge*, SRBA Subcases 36-2708, 36-7201 and 36-7217; see also *Hagerman Water Right Owners*, 130 Idaho at 742 ("When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue.")

The Recommendation properly recognizes that the Objectors met their burden of going forward with evidence to rebut the *Director's Report*, and that "the evidence presented at trial must then be considered and weighed" to determine whether the preponderance of the evidence supports irrigation since 1904 or irrigation beginning in 1969. (Recommendation at 9.) The Recommendation concludes that 4.5 acres were irrigated from 1904 to 1969, but it appears the Court misapprehended some evidence cited in support of that conclusion. While conflicting evidence was presented, Reid ultimately failed to prove by a preponderance of the evidence that any of his property was in fact flood irrigated from 1904 until the pump was installed in 1969.

a. Reid's burden is to prove actual irrigation of his property since 1904, not merely the theoretical possibility of irrigation.

SRBA decrees are supposed to be a judicial determination of actual beneficial water use. The decrees form the basis for water administration in response to delivery calls, and they are statutorily required to be treated as "conclusive as to the nature and extent of all water rights in the adjudicated water system." Idaho Code § 42-1420. Accordingly, Idaho Code § 42-1401(b) requires the Director of the IDWR to "make recommendations as to the extent of beneficial use." (Emphasis added.) Thus, when the Idaho Code § 42-1411 instructs the Director to prepare a "report on the water system," it means a report of an actual water system, not a report of a theoretically possible water system. Similarly, when that statute instructs the Director to report the "number of acres irrigated," it means the number of acres actually irrigated, not the number of acres that possibly could have been irrigated. While the Director can certainly consider various forms of evidence of beneficial water use, such evidence must signify actual water use, not merely the possibility of water use.

b. The evidence supporting Reid's claim is insubstantial and speculative.

The only evidence Reid presented of actual irrigation of his property prior to 1969 was the testimony of Don Miller which was very vague and inconclusive. Consequently, the Court relied principally upon IDWR agent Michael Holliday's calculation using a topographical map of

the maximum number of acres that theoretically could have been flood irrigated (the “topographic analysis”). As explained below, Don Miller’s testimony is heavily contradicted, and the Court’s reliance on the topographic analysis is in error.

i. Don Miller’s testimony.

The only evidence that could be construed to signify actual irrigation of Reid’s property prior to 1969 is the testimony of Don Miller that he thought there had at one time been a ditch that delivered Paradise Springs water south onto Reid’s property. This testimony was grounded in Don’s observation of willows located on Reid’s property, which Don opined must have meant there was at one time an irrigation ditch that ran out onto Reid’s property.

The Court relies heavily upon vague testimony by Don Miller that he “recalled a ditch on the property which followed the contour lines of the land.” (Recommendation at 12.) This testimony is compromised by the lack of any depiction of this purported ditch on any map. It is further undermined by Don’s inability to provide any degree of certainty concerning the purported irrigation and the location of the purported ditch. It must be recognized that Don Miller’s family owned and farmed Reid’s property throughout Don’s growing years. Don’s childhood home was located literally a stone’s throw from the 4.5 acres that were purportedly irrigated. As such, Don should have been able to testify of his personal experience irrigating this land or at least observing the irrigation practices on this land. If part of Reid’s property was really irrigated, there would have been a stark contrast between the crops raised there and the surrounding dry farmed portion of Reid’s property. Don should have been able to testify about turning water into the purported ditch, cleaning the ditch, repairing the ditch, playing in the ditch, or at least crossing the ditch every time he ventured more than a few hundred feet south of his house. He offered no such testimony. Instead, he had to rely upon his observation of willows!

The Court also points to a statement of Don Miller that “[h]e noticed that the ditch which exists on the Reid property was in a different location in earlier years.” (Recommendation at 8.) Yet this statement suffers from the same ambiguity as the testimony cited above. If the ditch was moved, where did it begin and where did it end up being located? What affect did the move have on the acres irrigated? And where is it now? If Don’s testimony is that the South Ditch was at one time located on Reid’s property and was subsequently moved, then that contradicts his own testimony that the South Ditch has been in same place for as long as he can remember.

The Recommendation also relies on the testimony of Don Miller that he “remembered watching his father flood irrigate some pasture.” (Recommendation at 7.) The Objectors have no doubt this is true, since the Millers regularly flood irrigated the land down-gradient from (north of) the South Ditch for pasture. This area, however, does not include any of Reid’s property. (See Exhibit C-1.) Don’s testimony that he saw his father flood irrigate some pasture simply does not verify irrigation of Reid’s property.

It would have been one thing if Don Miller identified the location of the acres his family flood irrigated on Reid’s property, the location of the ditch used to flood irrigate, and provided enough attendant facts to demonstrate that his recollection is reliable. The testimony he offered did not even approach that standard, instead relying on his “willow theory” which is easily explained.² Ultimately Don Miller provided no depiction of either a ditch or irrigated land. Altogether his testimony concerning irrigation of Reid’s property was tellingly vague. It was certainly not the type of clear evidence that must be required to disprove the accuracy of the beneficial use claims filed by Don’s father LeRoy Miller, as further discussed below.

ii. Topographic analysis.

With no substantial competent evidence of actual irrigation of Reid’s property, the court relied heavily on a topographical analysis performed by Michael Holliday: “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.” (Recommendation at 11; emphasis in original) This analysis, however, cannot be relied upon to support a finding of actual beneficial water use.

The problem with the topographic analysis is that it does not evidence actual irrigation of Reid’s property. It merely demonstrates the maximum number of acres that theoretically could have been irrigated. The Recommendation recognizes this (stating that 5.3 acres is the maximum that could have been irrigated) but then goes on to rely upon the topographic analysis to find that 4.5 acres were irrigated in fact.³ In essence, the court made an assumption that J.J. Miller and LeRoy Miller in fact irrigated the maximum number of acres that could theoretically have been irrigated. This includes an assumption that a ditch was constructed from the head of Paradise

² IDWR agent Michael Holliday, Mike Reid, Larry Kunz, and Todd Dustin all testified that the northwest corner of Reid’s property is naturally marshy. Mike Reid explained that this is because there are auxiliary springs in that area. There was no need for an irrigation ditch to deliver water to the willows because of the auxiliary springs.

³ The Court recommended the maximum number of acres that it believed could theoretically have been irrigated, calculated as the 5.3 acres derived from the topographic analysis less ½ of the marshy area which Reid admitted was impossible to farm.

Springs that did not drop in elevation a single inch (i.e. water did not flow in the ditch). There is simply no evidence in the record to support any of these assumptions.⁴

Moreover, the topographic analysis overstates the number of acres that were even theoretically possible to irrigate. The Court states that “[t]he acreage reduction was based primarily on the point of diversion and elevation contour lines of the place of use.” (Recommendation at 5.) However, the contour line used by Michael Holliday is not at the same elevation as the point of diversion—it is higher. Holliday did not determine the elevation of Paradise Springs and then create a contour line at that elevation. He simply used an existing topographic map and picked the contour line nearest Paradise Spring. Critically, the chosen contour line higher than the spring outlet, as shown on IDWR Ex. 17. Consequently, the Court’s recommendation of 5.3 acres is more than even possibly could have been irrigated. Even if the Court could justifiably recommend possible water use as opposed to actual water use—which the Objectors’ dispute—it must be limited to what is legitimately possible.

The SRBA is supposed to be a judicial determination of actual beneficial use of water, not a determination of theoretically possible beneficial water use. The Recommendation is in error because it is based principally upon speculation as to the maximum amount of acres that merely could have been irrigated. This error will not withstand judicial review: “The bottom line is that Findings of Fact supported by competent and substantial evidence, and Conclusions of Law correctly applying legal principles to the facts found, will be sustained on challenge or review.” *H&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881 (Ct. App. 1985).

iii. The marshy area.

The Court’s preoccupation with the possibility of water use rather than evidence of actual water use also led to an error in removing only one-half of the marshy area from the irrigable acres. The Court decided to cut the marshy area in half based upon Reid’s testimony that “about half of the red area can be cultivated.” (Recommendation at 6.) Again, Reid did not present evidence that one-half of the marshy area was in fact cultivated, he simply stated that one-half could have been cultivated. Reid was not qualified as an expert farmer, so he was not entitled to offer expert opinions about what can and cannot be cultivated. Moreover, Michael Holliday reviewed the 1960 and 1987 aerial photographs and testified that none of the marshy area was

⁴ The lack of witnesses able to testify about irrigation conditions that existed in the early 1900s should not be turned into an assumption that all land that was physically capable of being irrigated was in fact irrigated. It is Reid’s burden to prove irrigation, not the Court’s job to assume it.

cultivated at those times. Larry Kunz and Todd Dustin have been driving by Reid's property daily since the 1960s and testified that the marshy area has never been cultivated. It was legal error for the Court to remove only one-half of the marshy area from the place of use when the evidence undisputedly shows that none of the marshy area was irrigated in fact.

iv. Craig Kunz testimony.

The Recommendation also relies on testimony given by Craig Kunz that he observed crops growing on the Claimant's property in the 1950s and 1960s. (Recommendation at 12.) However, Craig Kunz did not testify that he observed irrigation of Reid's property. He only testified that he observed crops growing during that time period. The testimony of Craig Kunz simply confirms that Reid's property was dry farmed prior to 1969, which the Objectors do not dispute. It does not evidence actual irrigation of Reid's property at any time prior to 1969.

c. Substantial credible evidence uniformly demonstrates that Reid's property was not actually irrigated until 1969.

In contrast with the meager and questionable evidence cited above, there is a substantial amount of reliable evidence—indeed, a clear preponderance of the evidence—showing that Reid's property was not irrigated until 1969.

i. Testimony of Larry Kunz and Todd Dustin.

Larry Kunz and Todd Dustin provided testimony based on first-hand experience that there was no irrigation of Reid's property in 1968 and 1969. Todd and his father dry farmed Reid's property in 1968. There was no irrigation at that time and no ditches crossing the property. Larry Kunz helped LeRoy Miller install the electric pump in 1969 and the irrigation pipe needed to begin irrigating Reid's property. Larry testified there was no irrigation of Reid's property until the pump was installed. This was clear, certain and credible testimony.

ii. Aerial photo of 1960.

A most compelling piece of evidence is the USDA aerial photo of Reid's property taken in the year 1960. (Ex. C-30.) The photo shows the state of irrigation of Reid's property before the irrigation pump was installed in 1969. Despite Don Miller's testimony that there was an irrigation ditch running south to Reid's property, Michael Holliday reviewed this photo and testified that it shows no such ditch. It does show the South Ditch clearly, but no second ditch which would have been needed to irrigate Reid's property. This photo also shows that none of the marshy area was cultivated in 1960.

iii. Michael Holliday investigation.

The Court agrees with the *Director's Report* on the basis 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." (Recommendation at 11.) This statement infers that each of these considerations evidence actual irrigation of Reid's property from 1904 to 1969. However, the field exam and all other evidence examined by Michael Holliday indicate otherwise.

Evidence of depressions clearly cut against the assertion that a second ditch ran south to flood irrigate Reid's property since 1904. While Holliday did find depressions evidencing an old ditch running north of Paradise Spring (i.e. away from Reid's property), he did not similarly find depressions running south of Paradise Springs (i.e. toward Reid's property). The lack of any depressions evidences no historic ditch running to Reid's property. Holliday also reviewed the 1960 photographs and testified that it indicates no irrigation of Reid's property prior to 1969.

Holliday ultimately found nothing during his field exam and inspection of IDWR records and photographs that evidence irrigation of Reid's property prior to 1969. Were the *Director's Report* based on that evidence, Reid would have received no 1904 water. Without any evidence of actual water use, Holliday calculate the maximum number of acres theoretically could have been irrigated, basing the *Director's Report* solely on that analysis. If the topographic analysis is disregarded for the reasons explained above, then the only conclusion supported by Holliday's investigation is that Reid's property was not irrigated until 1969.

iv. LeRoy Miller's beneficial use claims.

By far the most persuasive evidence is two beneficial use claims filed in 1983 by Don Miller's father LeRoy Miller. Exhibit C-1 is a beneficial use claim for a 1904 priority water right from Paradise Springs. Exhibit C-3 is a beneficial use claim for a 1969 priority water right from Paradise Springs. These beneficial use claims are without question the most reliable evidence in the record of historic irrigation of Reid's property. LeRoy's father J.J. Miller homesteaded Reid's property. LeRoy grew up next to Reid's property. LeRoy owned and farmed the property from around 1942 to at least through 1983 when the beneficial use claims were filed. The claims were filed in 1983 when recollections of historic water use were more fresh than those offered a quarter of century later at the trial. Further, the claims were filed by the person who actually owned the property and did the irrigating. If Reid's property had in fact

been flood irrigated between 1942 and 1969 with a second ditch running further south of the South Ditch, LeRoy Miller would have had first-hand experience.

The fact that LeRoy Miller did not claim any of Reid's property in his 1904 claim is the most compelling and reliable evidence that Reid's property was not irrigated in 1904. (Ex. C-1.). The fact that LeRoy Miller did include Reid's property in his 1969 claim, under oath, is the most compelling and reliable evidence that Reid's property was first irrigated in 1969. These two claims should not be contradicted by the Court without clear and convincing evidence proving the claims were incorrect.

II. Even if a portion of Reid's property was irrigated in 1904, the water right was subsequently forfeited for non-use.

Even if Reid's property was flood irrigated in 1904 by a second ditch running south of the South Ditch, that ditch was not used for decades before the pump was installed in 1969. The 1960 photograph shows no second ditch running to Reid's property. There was no ditch when Todd Dustin helped his father farm the property in 1968. There was no ditch when Larry Kunz helped install the pump and farmed the property in 1969. Most tellingly, there is no ditch shown on either of the beneficial use claims filed by LeRoy Miller who owned and farmed the property from 1942 through 1969. Clearly, if some form of irrigation took place on Reid's property in the early 1900s, it ceased for decades during the mid-1900s and was forfeited under Idaho Code §42-222 which provides, in relevant part:

All rights to the use of water acquired under this Chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through non-use or forfeiture, such rights to such water shall revert to the State and be again subject to appropriation under this Chapter. . . .

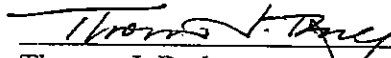
CONCLUSION

All there is to support Reid's claim that his property was flood irrigated from 1904 to 1969 is the uncertain testimony of Don Miller. That meager testimony is heavily outweighed by a host of reliable sources which uniformly show that Reid's property was first irrigated in 1969—including the 1960 aerial photograph, the testimony of Todd Dustin and Larry Kunz, Michael Holliday's inability to find any evidence of a ditch during his field exam, and most importantly LeRoy Miller's beneficial use claims. The preponderance of the evidence simply does not support a 1904 priority water right for any of Reid's property. Even if there was some

irrigation of Reid's property in the early 1900s (for which there is only speculation) such irrigation was discontinued at least from 1942 to 1969, resulting in forfeiture of the water right.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF SERVICE

I CERTIFY that on this 20th day of August, 2010, the above **Objector's Motion to Alter and Amend** was served in the following manner:

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