

RECEIVED  
SEP 01 2010  
DEPARTMENT OF  
WATER RESOURCES

|                                                                                         |                       |
|-----------------------------------------------------------------------------------------|-----------------------|
| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |                       |
| AUG 31 2010                                                                             |                       |
| By _____                                                                                | Clerk<br>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     | ) Subcase No. 75-14092    |
|                | )                         |
| Case No. 39576 | ) MEMORANDUM DECISION AND |
|                | ) ORDER ON CHALLENGE      |
|                | ) (Gooby)                 |
|                | )                         |
|                | )                         |

**Holding: Decision of the Special Master; Affirmed.**

I.

**FACTS AND PROCEDURAL BACKGROUND**

This matter originated when Dale Gooby ("Claimant") filed a *Notice of Claim* for water right 75-14092. In his *Notice of Claim*, Claimant asserted the right to use 0.19 cfs of water from Wallace Creek in Lemhi County, Idaho for irrigation of 9.7 acres based on beneficial use. Water right claim 75-14092 proceeded in the Snake River Basin Adjudication ("SRBA") grouped with five other water rights claimed by various Wallace Creek water users.<sup>1</sup> The six water rights were grouped together because they were all associated with land that although now subdivided was once part of a unified tract known as the Joseph Sanderson Homestead and because they all shared a common parent water right.

The *Director's Report* issued by the Director of the Idaho Department of Water Resources ("IDWR") for water right claim 75-14092 recommended 0.19 cfs from

<sup>1</sup> The group consisted of water right claim 75-14092 (Claimant's claim), as well as water right claims 75-14090, 75-14093 (split into 75-14512 and 75-14513), 75-14100 and 75-14302.

Wallace Creek for the irrigation of 9.7 acres with a priority date of April 17, 1923. The recommended elements contained in the *Director's Report* were consistent with the elements asserted by Claimant in his *Notice of Claim*. In February 2007, Jeffrey Waite and Dan Farley (collectively, "Objectors") filed *Objections* to the recommendation for water right claim 75-14092, asserting that it should not exist. In addition to objecting to water right claim 75-14092, Objectors filed *Objections* to several of the other water right claims grouped with Claimant's claim.

Trial on the *Objections* was held in Salmon, Idaho, on September 30, 2009. Claimant appeared *pro se*, Objector Jeffrey Waite likewise appeared *pro se* and Objector Dan Farley was represented by his attorney of record Milton A "Jock" Slavin. Monica Van Bussum, a senior water resource agent for IDWR, presented the basis for IDWR's recommendation with respect to the various claims. To aid the Court, Ms. Van Bussum created a map of the subject properties, including Claimant's property, on which she outlined the recommended irrigated acres for each claim prior to trial ("the Map"). The Map was admitted at trial as IDWR Exhibit 3 without objection. With respect to water right claim 75-14092, Ms. Van Bussum reiterated IDWR's recommendation and testified that the claim should be decreed as recommended.

Ms. Van Bussum's testimony was followed by the testimony of William R. Maxwell. Mr. Maxwell's parents, who purchased the property in 1951, were prior owners of the Joseph Sanderson Homestead and Mr. Maxwell grew up on the Homestead prior to its subdivision. Mr. Maxwell was asked to identify those acres irrigated by him and his family and mark the same on the Map. With respect to what is now Claimant's property, Mr. Maxwell identified and marked on the Map an irrigated acreage smaller in size than that outlined and recommended by Ms. Van Bussum. Claimant did not object to any portion of Mr. Maxwell's testimony, nor did he object to the markings made by Mr. Maxwell on the Map.<sup>2</sup>

Next to testify was Kenneth "Bud" Lesley, who was a resident of Salmon for 29 years, and who leased most of the Joseph Sanderson Homestead from 1981 until 1985 for

---

<sup>2</sup> A transcript from the trial was not requested and made part of the record. Accordingly, the Court relies on the findings made in the *Special Master's Report and Recommendation*, the representations made in the briefing on challenge and the inquiries made by the Court during oral argument. However, it is not in dispute that no objection was made regarding the Maxwell testimony.

grazing purposes. The record reflects that with respect to the issue of the irrigated acreage of the various properties, including Claimant's property, Mr. Lesley's testimony was consistent with that of Mr. Maxwell's. Mr. Lesley testified that he was in agreement with the testimony of Mr. Maxwell and the markings he placed on the Map identifying irrigated acreage. No objections to Mr. Lesley's testimony were made by Claimant.

In support of his *Objections* to the various claims, Objector Farley, via his attorney, agreed with and expressly incorporated Mr. Maxwell's and Mr. Lesley's testimony regarding irrigated acreage into his case in chief. Claimant did not present any witnesses or submit any evidence in support of his claim at trial.

On April 5, 2010, the Special Master issued a *Request for Suggestions RE: Draft Special Master Report and Recommendation* ("Request"). The Request attached a *Draft Special Master Report and Recommendation* containing proposed findings of fact and conclusions of law for the parties' review and requested that the parties submit their suggestions regarding the same pursuant to I.R.C.P. 53(e)(5). The Request also directed that IDWR submit draft partial decrees for the six water right claims with the elements as determined in the *Draft Special Master Report and Recommendation*.

On April 23, 2010, IDWR submitted draft partial decrees for all six water rights involved in the trial. In the correspondence accompanying the draft partial decrees, IDWR stated that "the total number of irrigated acres for each water right is based upon the boundaries drawn on IDWR Exhibit 3 by Bill Maxwell." With respect to water right claim 75-14092, the draft partial decree reduced the recommended place of use from 9.7 acres to 6.1 acres and reduced the quantity from 0.19 cfs to 0.12 cfs, as a result of the reduction in acres based on the inch per acre standard.

On April 27, 2010, the Special Master issued his *Special Master Report and Recommendation*. With respect to the issue of irrigated acreage, the Special Master held as follows:

The evidence presented at trial, while conflicting and confusing at times, supports IDWR's recommendations of the Upper Wallace Creek claims as described in the *draft partial decrees* submitted by IDWR April 23, 2010. 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.

(*Special Master Report and Recommendation*, p. 6) (emphasis added). Thus, water right claim 75-14092 was recommended by the Special Master consistent with the draft partial decree.

Claimant timely filed a *Motion to Alter or Amend the Special Master's Report and Recommendation* on May 19, 2010, asserting that the quantity and place of use for water right claim 75-14092 should reflect the quantity and place of use recommended by IDWR in the *Director's Report*. In support of his *Motion*, Claimant filed an *Affidavit* of William Maxwell ("*Maxwell Affidavit*") in which Mr. Maxwell asserted that based on his review of further aerial imagery provided to him by Claimant, it was his belief that his testimony at trial with respect to the irrigated acreage of water right 75-14092 was erroneous. He further stated that "I would agree that the original irrigated area recommended by IDWR January 11<sup>th</sup>, 2007 was reasonably accurate." Hearing on Claimant's *Motion* was held before the Special Master on June 10, 2010.

On June 17, 2010, the Special Master issued an *Order Denying Motions to Alter or Amend*.<sup>3</sup> Claimant subsequently timely filed a *Notice of Challenge* with this Court. Following the submittal of opening briefing by the Claimant, hearing on Claimant's *Challenge* was held before this Court on April 17, 2010.

## II.

### MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on August 17, 2010. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or August 18, 2010.

## III.

### DISCUSSION

#### A. Standard of review on challenge.

---

<sup>3</sup> In addition to addressing Claimant's *Motion to Alter or Amend*, the Special Master's *Order Denying Motions to Alter or Amend* also addressed issues in the five other subcases grouped with water right claim 75-14092 raised by other *Motions to Alter or Amend* filed in those subcases by various parties.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

**B. The Special Master did not error in recommending the quantity and place of use elements of water right claim 75-14092 for less than what was recommended by IDWR in the Director's Report.**

In his *Notice of Challenge*, Claimant requests that this Court reverse the Special Master's denial of his *Motion to Alter or Amend* and change the *Partial Decree* for water right claim 75-14092 to reflect the quantity and place of use recommended by IDWR in the *Director's Report*. In support of his *Challenge* Claimant argues that the quantity and place of use elements of water right claim 75-14092 should never have been placed at issue at trial because nobody objected to those specific elements. In addition, Claimant argues that the Special Master erred in relying upon the testimony of William Maxwell to reduce the quantity and place of use elements of water right claim 75-14092 because a post-trial affidavit from Mr. Maxwell indicates that his testimony and markings on the Map at trial were incorrect with respect to water right claim 75-14092. For the reasons set forth below, the Special Master did not error in his recommendation with respect to the quantity and place of use elements of water right claim 75-14092.

**i. An objection that a water right should not exist puts all the elements of that right at issue.**

Idaho Code § 42-1411 sets forth the procedure governing IDWR's preparation and filing of Director's Reports for water rights claimed in the SRBA. It provides that the Director in preparing a Director's Report shall determine the following elements: (1) the name and address of the claimant; (2) the source of water; (3) the quantity of water; (4) the date of priority; (5) the point of diversion; (6) the purpose of use; (7) the period of use; and (8) the place of use. I.C. § 42-1411(2). Once prepared, the Director is directed to file the Report with the district court, where it becomes part of the record and constitutes "prima facie evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4). As a general matter, when there are no objections to the Director's Report for a water right claim, each element of that claim is decreed as recommended in the Director's Report, subject to review by the Court. *Id.* However, such was not the case here.

In this case two *Objections* were filed in response to the Director's recommendation for water right 75-14092, both of which challenged the existence of the water right. An objection to a water right recommendation that the same should not exist by its very nature challenges the validity of the Director's recommendation in its totality and necessarily puts all of the recommended elements of that water right at issue. In other words, an objection that a water right should not exist is an assertion by the objector that each and every element of that water right should be decreed in a manner inconsistent with the Director's Report. It follows that when Objectors filed their respective *Objections* to the recommendation for water right claim 75-14092 asserting that the water right should not exist, all the elements of water right claim 75-14092 were put at issue for trial. Accordingly, the Special Master did not error in entertaining evidence presented at trial pertaining to the quantity and place of use elements of water right claim 75-14092.

**ii. The Special Master's recommendation with respect to water right claim 75-14092 is supported by the evidence presented at trial.**

An evaluation of the Special Master's recommendation and subsequent *Order Denying Motions to Alter or Amend* requires a review the burdens of proof, presumptions and evidentiary standards applicable to a contested proceeding in the SRBA. Under Idaho law, any party filing an objection to any portion of the director's report for a water right claim has "the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." I.C. 42-1411(5). The burden is on the objecting party since the director's report is prima facie evidence of the nature and the extent of the recommended water right. *Id.* However, once the objecting party produces evidence rebutting the director's report with respect to a recommended element of a contested water right, the burden is then on the claimant of the water right to produce evidence in support of his claim. *Id.* (providing "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right").

In this case, Objectors had the initial burden of going forward with evidence to establish elements of water right claim 75-14092 inconsistent with the *Director's Report* description of the same. In support of his *Objection*, Objector Farley incorporated the trial testimony of both William Maxwell and Kenneth "Bud" Lesley. Mr. Maxwell provided testimony at trial regarding the identification of those acres of Claimant's property historically irrigated by him and his family. Mr. Maxwell, without objection from Claimant, identified and marked on the Map an irrigated acreage smaller in size than that outlined and recommended by Ms. Van Bussum. Mr. Lesley testified that he was in agreement with the testimony of Mr. Maxwell and the markings he placed on the Map identifying irrigated acreage. The Special Master found this testimony credible and held 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." (*Special Master Report and Recommendation*, p. 6).

Once Objectors set forth their evidence showing that the irrigable acreage of Claimant's property was less than what was recommended by IDWR, it was incumbent upon Claimant to produce evidence in support of the irrigable acreage he claimed in his *Notice of Claim*. Claimant failed to carry his burden in this regard and did not present any witnesses or evidence in support of his claim at trial. Although Claimant appeared

*pro se* at the trial, this Court is nonetheless required to hold him “to the same standards and rules as those represented by an attorney.” *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123, (2005). Moreover, while a court may make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard, courts are required to apply the applicable burdens of proof, presumptions and evidentiary standards to *pro se* litigants in the same manner as they would be applied to litigants represented by an attorney. *See e.g., Shelton v. Shelton*, 148 Idaho 560, 225 P.3d 693, 698 (2009) (stating “the *pro se* litigant is entitled to have the rules of civil procedure applied to him or her in the same manner as they would be applied to an attorney”); *see also*, Comment 2.2 to Model Code of Judicial Conduct (stating, “a judge can make reasonable accommodations to ensure *pro se* litigants the opportunity to have matters fairly heard”).

The only evidence at trial regarding the irrigated acreage of water right claim 75-14092 aside from IDWR’s recommendation was presented via the testimony of Mr. Maxwell and Mr. Lesley. Both testified that the applicable irrigated acreage was less than what was recommended by IDWR. As a result, the Special Master’s recommendation with respect to water right claim 75-14092 is supported by the evidence presented at trial and is not in error.

**iii. The Special Master did not abuse his discretion in failing to grant Claimant’s *Motion to Alter or Amend* based on the new evidence proffered by Claimant.**

Motions requesting the Special Master to amend findings or conclusions, or to make additional findings or conclusions, following trial are governed by Idaho Rule of Civil Procedure 52(b). The decision to grant or deny a motion to alter or amend is within the sound discretion of the trial court (Special Master) and will not be disturbed short of a showing of a manifest abuse of that discretion. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

In his *Motion to Alter or Amend*, Claimant requested that the Special Master alter and amend his findings with respect to water right claim 75-14092 to reflect the quantity and place of use recommended by IDWR in the *Director’s Report*. In support of his *Motion*, Claimant filed the *Maxwell Affidavit* which provided in pertinent part as follows:

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. I have since reviewed with Dale Gooby the draft recommendations (April 27, 2010) for his water right claims. I see that the line that I marked on Dale Gooby's property is in error. After reviewing higher quality Aerial Imagery than that presented at the hearing, I would agree that the original irrigated area recommended by IDWR January 11, 2007 was reasonably accurate.

Claimant requested that the Special Master amend his findings based on this new testimony.

It is undisputed that the *Maxwell Affidavit* was produced post-trial. It is also clear that Mr. Maxwell changed his testimony based on his review of certain "Aerial Imagery" that was not produced at trial, and that the other parties to the proceeding did not have the opportunity to review, object to or examine the "Aerial Imagery." In this regard, Claimant's *Motion* requested that the Special Master alter his recommendation based on new evidence. This Court has previously held that in the context of a motion to alter or amend based on newly discovered evidence "the movant may not introduce evidence that was available at the time of trial but not proffered." *Order on Challenge*, Subcase Nos. 36-2708 *et al.*, (December 29, 1999), p. 21. The Idaho Supreme Court has defined what constitutes newly discovered evidence: "In order to be newly discovered evidence, the evidence itself, not just the importance or materiality of that evidence, must be unknown and unavailable prior to trial." *State v. Stevens*, 146 Idaho 139, 146, 191 P.3d 217, 224 (2008) (citing *State v. Weise*, 75 Idaho 404, 410, 273 P.2d 97 100-01 (1954)).

In this case neither the testimony of William Maxwell nor the "Aerial Imagery" referred to in the *Affidavit* fit the definition of newly discovered evidence. The Claimant, via proper diligence, certainly could have produced that evidence at trial. Indeed, Mr. Maxwell testified at length at the trial, and Claimant had the opportunity to, and in fact did, cross-examine Mr. Maxwell.<sup>4</sup> Likewise, had Claimant wished to offer into evidence aerial imagery other than that produced at trial (i.e., the Map) Claimant could have done so. The Claimant could have also offered his own testimony regarding the number of irrigated acres.

---

<sup>4</sup> It should also be noted that when Mr. Maxwell testified at trial regarding the irrigated acreage of Claimant's property and marked the same on the Map, Claimant did not raise any objections to the same.

Furthermore, this Court has previously held that in the context of a motion to alter or amend, additional evidence may not be introduced in order to relitigate the merits of the case. *Order on Challenge*, Subcase Nos. 36-2708 *et al.*, (December 29, 1999), p. 21. The issue of the irrigated acreage of water right claim 75-14092 was addressed and testified to at trial. The time for Claimant to present evidence supporting his claimed quantity and place of use with respect to water right claim 75-14092 was at trial. Claimant did not present any evidence in this respect, and cannot now present new evidence in an effort to relitigate the issues of quantity and place of use.

Finally, the legal standard governing a motion to reopen a case to present newly discovered evidence requires that the moving party must show some reasonable excuse for failure to present the evidence at trial. The standard protects the integrity of the trial and encourages parties to marshall their evidence in a timely fashion. *Tucek v. Huff*, 115 Idaho 905, 907, 771 P.2d 923, 925 (Ct. App. 1993). The determination of whether to reopen is left to the discretion of the trial judge. In this case the evidence sought to be introduced does not constitute newly discovered evidence nor has the Claimant demonstrated a reasonable excuse for failing to present the evidence at trial.

Accordingly, the Special Master did not abuse his discretion in failing to grant Claimant's *Motion to Alter or Amend*.

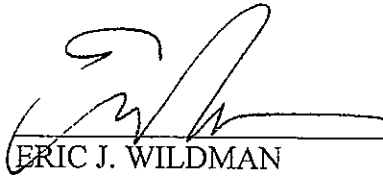
#### IV.

#### ORDER

For the reasons set forth above, Claimant's Challenge is **HEREBY DENIED**. Pursuant to I.R.C.P. 53(e)(2) and *AOI* section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Report and Recommendation* and *Order Denying Motions to Alter or Amend* and wholly adopts them as its own. Water right claim 75-14092 will be decreed as recommended by Special Master in the *Special Master Report and Recommendation*.

IT IS SO ORDERED.

DATED: \_\_\_\_\_.

A handwritten signature in black ink, appearing to read 'Eric J. Wildman', is written over a horizontal line.

ERIC J. WILDMAN  
Presiding Judge  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM  
DECISION AND ORDER ON CHALLENGE was mailed on August 31, 2010,  
with sufficient first-class postage to the following:

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

A handwritten signature in cursive script, appearing to read "Julie Murphy", is written over a horizontal line. The signature is fluid and stylized, with the first and last names being clearly legible despite the cursive style.