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DEPARTMENT OF
WATER RESOURCES

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

9-8

In Re SRBA

Case No. 39576

Subcase Nos. 22-13212,
22-13503

**Response to Objectors
Motion to Alter or Amend**

Introduction

I have never seen such a mischaracterization of facts as presented in the Objector's Motion to Alter or Amend. I don't want to waste time at the hearing rebutting the lies told in the Objectors Motion to Alter or Amend and instead do so now for the record.

Response to Background

In the Objector's Background section, I fail to find one true statement. They start by questioning the best science available by assuming a flawed topographic analysis, and then suggest that this ruling "tragically" enables me to call their groundwater rights. Actually, I acquired another parcel some years ago with homestead era spring rights that are now decreed, and I could activate my delivery call without the rights in front of us today that I own on Paradise Springs. Whether or not the Special Master had understood the truth and ruled that my property was irrigated from 1904 to present, I have and have had a right to make a delivery call against Todd Dustin, Larry Kunz, and the other groundwater users within the area of common groundwater use as defined in the Evaluation of Groundwater Pumping on Paradise Springs performed by Brockway Engineering. I am glad to know that they agree that if I own spring rights then this "enables the claimant ("Reid") to succeed in his ill-conceived quest to shut down neighboring groundwater rights..." as this will make the conjunctive management portion of this conflict much simpler.

I actually moved to Idaho in 1995 as I testified, not 1999 as Mr. Budge states at the beginning of paragraph 2, Background. For some time I lived at and was acquainted with a property across the road from the property I now own. I testified that I observed irrigation on my property that watered potatoes in 1996 and 1997 and also grew hay

and barley in 1998 and 1999, so I knew there were good irrigation rights associated with the property. I asked Don Miller pointedly about the water history on the property and knowing what I knew, which is some of what we know today, I purchased the property. One of the first documents Don Miller gave me was JJ Miller's Notice of Water Right, dated 5/23/1901. It's true that I know a lot more about Idaho water law than I did then, but coming from Colorado I understood that first in time was first in right. It's also true that after more than a thousand hours of research, I know a lot more about the history of my water rights and the other rights in the area now than I did when I first moved onto my place.

I never made any assumptions about anything; I did present facts to the State as they became available to me and I did make a water call against Todd Dustin, Larry Kunz, and the other groundwater users within the area of common groundwater supply. In fact, Mr. Tuthill did recognize the delivery call I made; however, when we discussed the issue with Tim Luke, Tim pointed out that all of the rights would have to be decreed for IDWR to be able to administrate those rights, and since the process was about to begin for all of Basin 22, it was not a 'ripe' situation and legally we would have to wait for everyone, including the groundwater right holders, to have their rights examined and decreed prior to administration. It's also true to say that I know a lot more about the application of the Rules for Conjunctive Management now than I did a decade ago as well.

Response to Argument

The only resounding success is that I was able, with only the truth on my side, to present enough evidence and work hard enough in court to prevent two of the best attorneys in the state from twisting the facts to their advantage through legal techniques. This is, for a guy with cows and no J.D., a worthy feat. The preponderance of the evidence supports the fact that the lower section of my property was flood irrigated from 1904 until sprinklers were installed, sometime in the 1960's. However, Mr. Budge acts as though unless I produced John, Chet, and Roy Miller to testify about their own personal experiences using water, then I didn't prove my case. Never mind that they are all long dead. Never mind that he wasn't able to produce a witness who could remember anything prior to 1968 due to the fact that his witnesses were 4 and 15 at the time, but he vigorously states that he *knows* there was no irrigation between 1904 and 1969 and that he *knows* if there was then the water was forfeited. He has no

documentation to back those statements up nor any witness testimony that would indicate any truth in what he says.

Section I, a.

The evidence of irrigation that I presented was a vast network of testimony and sworn, notarized documentation that all confirmed that JJ Miller began irrigating my place in 1904 as soon as the dam was constructed. He moved from his original homestead due to his complete inability to get water for either irrigation or culinary purposes. The dam and ditch he constructed with George Walton was not just to irrigate the lower portion of my place, but to continue and irrigate lands owned by Caroline Withrich and George Walton below and to the east of me. John Miller understood the need for irrigation and he worked hard to provide as much of his property as he could with water. The written testimony of his son, Chet Miller, supports this as does every other document. None suggest that John Miller did anything but irrigate as much of his land as possible, and that included a portion of my place. Don Miller testified that his Uncle Sam Miller had the ditch surveyed before Roy moved there so as to get every acre underneath it possible for irrigation, and that they had a garden under this ditch. He testified that his father irrigated the pasture that is so clearly evident in the 1960 aerial photo, below the ditch that was also evident to many witnesses that goes along the contour lines on the lower section of my property. He testified that some of the willows that were there along the ditch that he remembered from childhood were evident in the 1960 photo as well and explained to Mr. Budge that willows only grow where there is water. Rex Miller testified that his Uncle Roy Miller had a pasture in the location identified below the ditch as Roy's pasture by Don Miller. Craig Kunz testified about how most of the flooding done when he was growing up was onto pastures and that Roy Miller did the same.

Section I, i.

Don Miller's testimony was neither vague nor inconclusive, nor was it ever contradicted. His testimony was thoughtful, truthful, and very accurate, even when under intense badgering by Mr. Budge. For a man in his late seventies, his memory of his childhood was actually quite clear. Mr. Budge makes quite a bit of the fact that Don Miller never personally irrigated my pasture. It was Don's job as a child to irrigate the windbreak trees and he did remember doing that from the ditch. He remembered that his father irrigated my pasture. It should be noted that irrigation of the pasture from a ditch that is flat could be

undertaken in about 10 minutes, so it is not a huge job to irrigate the pasture. You simply block the ditch with a tarp and water exits over the edge from rivulets that were cut in to the ditch bank 100 years ago and everything gets covered with water. The fact that Roy Miller did this himself and didn't assign it to Don doesn't surprise me the way it seems to surprise Mr. Budge. Mr. Budge then quotes Don as saying that he "recalled a ditch on the property which followed the contour lines of the land." Mr. Budge describes this as vague, but it seems quite clear to me, and this is the same way everyone else in the courtroom described the ditch and I personally know of no better way to do such. As if he needed more clarity, Don pointed out exactly where the ditch was on Mr. Budge's 1960 aerial photograph, which when carefully blown up to 2' x 3' for display as Mr. Budge did, showed clearly the placement of the ditch, where Roy's pasture is, and where the willows Don remembered as growing along the ditch were.

There was some lack of clarity in Mr. Budge's questions about the south ditch. What we call the South Ditch is what stands today. Some of Mr. Budge's questions referred to the South Ditch as being the one that crossed my place. The ditch that crossed my place was known as the Walton ditch because that ditch supplied half of George Walton's place with water. The confusion was not Mr. Miller's, but that of his interrogator.

Crucially, Mr. Budge did ask Mr. Miller about the space just within the windbreak, but west of the current location of the South Ditch and Roy Miller's house. He asked Mr. Miller if that area was their garden and Mr. Miller said yes. To be more descriptive, this is a square, open area to the south and west of the current location of the ditch, which is slightly to the north of my property line, and is surrounded by windbreak trees. When we looked at the 1960 aerial photo, the ditch running onto my property would have been just west and upgradient from the garden, just before it came on to my property. Now, besides all of the trees that were obviously irrigated below my ditch, we have testimony that the Miller's garden was below my ditch as well. Gardens require regular water, like windbreak trees, and the Miller's located their garden down gradient from water, which came from my ditch, the Walton ditch, when it was still there.

Mr. Budge concludes that Mr. Miller should have "identified the location of the acres his family flooded on Reid's property, the location of the ditch used to flood them, and provided enough attendant facts to demonstrate that his recollection is reliable." In fact, he did identify the pasture, where the ditch was, what was irrigated, where the

garden was, how he watered the windbreak, and other pertinent facts regarding his existence here in Cedron. He had no willow theory, just an explanation to Mr. Budge who wouldn't accept the truth that willows need water and the reason they were clearly growing there in the photo is because they were next to the ditch which he had already identified—without a 'willow theory.'

Section I ii.

The topographic analysis may be flawed, but from my perspective, it's flawed by not showing enough acreage underneath the ditch. When I first consulted Mr. Galbraith about this claim, he told me that the most acreage he could credit me with under the ditch was a little more than 8 acres. How this was reduced to 5.3 acres I am not aware of. Mr. Holliday says that he used the best maps available and the computer spit out this number. Well, maps have differing levels of accuracy and as Mr. Budge has pointed out, only a few feet of elevation could signal a significant difference in the total acres, especially with a flat ditch. Because with the accomplished transfer, documented by Roy Miller in ex C-3, I have as much water as I need and I have chosen not to get this area surveyed because I do not believe that an acre here or there makes or breaks me. Similarly, Mr. Budge offers no alternative to Mr. Holliday's science, and so he should have no complaint about it.

Section I iii.

I testified that the marshy area has one auxiliary spring—not more than one. The flow from this auxiliary spring is not as much as you could get out of a garden hose. The water does drain down along the road, and there is a half circle of marshyness in a radius around the spring. I drew this area on a map when I testified, I forget which one, but it resembles the shape of a key with half of a round head that is adjacent to the road. The location of the willows that Don Miller referred to, that are no longer there for lack of water, are much higher in elevation and 150 feet south of the one auxiliary spring outlet that is in the marshy area.

Section I iv.

Mr. Budge states that "the testimony of Craig Kunz simply confirms that Reid's property was dry farmed prior to 1969." Besides testifying that Roy Miller was a dairy farmer who flooded pastures, Craig Kunz

testified that, in conflict with Mr. Budge's statement, there were sprinklers on the Reid property before 1969.

Section c. i, ii

The testimony of Todd Dustin and Larry Kunz severely lacks any relevance to the case. If they could even remember back to 1968, they could remember no further than that. Whether or not there was a ditch across my place at that time, I don't know. I do know that when Larry Kunz installed the permanent electric pump with Roy Miller, that the pumping pool was already there. Many witnesses remember seeing water pumped on to my place prior to 1969, but they can't agree who did the pumping. Once the ditch was dismantled, a person would want to have a way to use the water and it is apparent to me that Roy Miller did some pumping prior to installing the permanent electric pump in 1969. The 1960 aerial photo, when nicely blown up, shows clearly the location of the pasture, the location of the ditch, the difference in the crops above and below the ditch, the willows growing along the ditch, the location of the Miller's garden and the location of the windbreak. Many witnesses testified to these things. Only Michael Holliday failed to see them. I refer to my post trial brief where I state and give examples of the ways Mr. Holliday has failed in this examination, and this is just one more.

Section C iv.

Don Miller gave a clear account of what he and his father were trying to do when they filed their claims, exhibits C-1 and C-3. It was noted that both of the remarks said the same thing, although one priority date was 1904 and one was 1969. Don said they were trying to document what happened when they put in the pump in 1969, but that they were trying to file on the Miller right with both claims, which is why the remarks are the same. Mr. Budge wants to know why Roy Miller didn't file C-3 as 1904, or why he didn't show a ditch under that claim as well. It is a simple idea really. Don and Roy were racing to get their claims done, as Don testified. They wanted to document what was happening at that time, in 1983. In 1983, the ditch that had been on my place had long since been destroyed in favor of pumping and sprinklers. Those sprinklers, in Don and Roy's minds, were pumping the John Miller right, priority 1904. John Miller died in December of 1963, after seeing Chet tractor pump water onto the upper lands north of the Springs for the first time that year. At that time, it was obvious to everyone that the Miller's owned more than enough water to cover all of the lands homesteaded by John Miller,

and by 1967 Ray Rigby was trying to gather the legal ends together for the Millers because they wanted to pump everything. Although there is no will of John Miller, the land and water were split according to his direction. 1 cfs went north of the Spring and 1 cfs went to Roy Miller on the south side. Roy Miller tried to be as clear as he could about when he permanently changed to sprinkler irrigation, and in doing so, inadvertently claimed a later priority date than was applicable. He should have claimed a 1904 priority for the claim exhibit C-3, and then everything would have been right. He instead chose to claim 1969 as the priority, because that was when the sprinklers went in and when the accomplished transfer from the north end took place, and he thought that was what he should be documenting since everyone knew he was pumping his father's right. Everyone except Mr. Budge.

The fact that the claim, C-3, shows no ditch, does not mean there never was one, and the fact that the claim of priority was 1969 does not mean that the water coming from the sprinklers was not the Miller right, with a priority of 1904.

What Roy Miller claimed in his claim, exhibit C-1, was the land that he still was flood irrigating in 1983. The total of that flood irrigation in 1983 was more than 8 acres. What he was still flooding in 1983 was covered under ex. C-1, and what he was sprinkling in 1983 was covered under C-3. Both have the same remarks that the water used is the Miller right. His claims make perfect sense viewed this way. The claims were filed to document what was happening in 1983—not what had happened the previous 80 years. Don testified that it was their intent to claim the Miller right on both claims. Ex. C-3 has one mistake—the priority should be 1904.

Section II

Clearly no forfeiture took place. Roy Miller flooded his pasture, and then pumped water onto my entire property in between 1942 and 1969. The ditch was clearly shown in the 1960 aerial photograph, identified by many witnesses, so in 1960 it was still there. Mr. Budge provides no evidence between 1942 and 1968 that there were 5 consecutive years when irrigation was not used, only a theory, which is not supported by the evidence or testimony. Other witnesses also provided testimony that irrigation was used in the 1960's on my property. Mr. Budge's forfeiture theory is just that—a baseless theory.

Conclusion

This case began with the Objectors asserting that it was physically impossible for water to have been used on my property; they asserted that John Miller's right was properly decreed in the Rexburg Decree, onto land not owned by me but all upgradient from Paradise Springs. They retreated in the face of overwhelming evidence to a position that while it was theoretically possible for water to have reached my place, it was purely speculative that it ever did. They retreated to assert that if water had been used, then it must have been forfeited between 1942 and 1969, although all of the evidence presented contradicts this theory, as it contradicts all of their theories. I have spent more than a thousand hours researching the water rights associated with Paradise Springs and I have never come across any document or reliable, independent testimony that indicates anything other than what I have claimed in the SRBA. If I had any doubt as to my ability to prove this case beyond a reasonable doubt, I would surely have hired an attorney. The problems for the Objectors are, that they have no independent evidence to support any of their theories, and that all of the available evidence rejects those theories—this is why I had such confidence in the case as to represent myself. Mr. Budge would assert that since I didn't have John, Roy, and Chet Miller all testify along with all of the other witnesses, that there must not have been water use and that I must not own any water rights—yet he has no witnesses that can remember anything before 1968, and the witnesses he has are the defendants in a conjunctive management action that I have brought before the Department. The Objectors have been able to use the SRBA Court system to delay this conjunctive management action but come it will, whether I bring it or the department acts to manage water to the benefit of senior users without a court action as they should. I was appalled at the baseless lies told in the Objector's Motion to Alter or Amend, and shocked at the lack of any evidence to support any of their theories and the lack of logic and truth in their accusations. All of the Objectors lies together don't even make half a truth and I urge the Special Master to stay with the initial ruling, that my property was irrigated from 1904 to present.

 9/7/2010
Michael L Reid Date

I certify service to the following:
TJ Budge, Attorney for Objectors
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