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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
OCT - 1 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	)	SUBCASE NOS: 22-13212 AND 22-13503
	)	
Case No. 39576	)	ORDER ON MOTIONS TO ALTER OR
	)	AMEND
_____	)	

I. PROCEDURAL BACKGROUND

A *Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law* was issued for these water claims on July 30, 2010 after a trial. The court concurred with the *Director's Report* recommendation disallowing 22-13503. The court agreed with much of the *Director's Report* for 22-13212 which recommended only 5.3 acres out of the 35.6 acres claimed. However, the *Special Master's Report and Recommendation* recognized a smaller area of just 4.5 acres. The reduction in acreage was based on a marshy area shown on IDWR Exhibit 18 which was calculated as 1.6 acres. Testimony from the claimant conceded that half of the marshy area was not cultivated. Thus, the *Special Master's Report* found a total of 4.5 acres for the water right. A reduction of the 5.3 acres by the .8 acres resulted in a recommendation for 4.5 acres in total.

The claimant of these water rights is Michael Reid. Mr. Reid operates a small dairy in Victor, Idaho, which produces milk and cheese on land once owned by J.J. Miller. Mr. Reid claimed entitlement to part of J.J. Miller's water right 22-405 from the *Rexburg Decree*. The *Special Master's Report and Recommendation* recommended a much smaller part of the J.J. Miller right than Mr. Reid claimed. After the *Special Master's Report and Recommendation* issued, Mr. Reid filed a *Petition for Reconsideration* intended as a *Motion to Alter or Amend*. The Objectors included Cedron Irrigation LLC, Mahogany Ranch Holdings, Teton Rainbow Ranch Inc., and Wally Rothgeb Jr. (hereafter "Objectors"). The Objectors asserted that Mr. Reid

is not entitled to part of J.J. Miller's water right 22-405 with a 1904 priority. Objectors argued that no part of Mr. Reid's land was irrigated until 1969. Therefore, Objectors also filed a *Motion to Alter or Amend*. A hearing was held September 13, 2010.

II. THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

The *Special Master's Report and Recommendation* concurred with the *Director's Report* finding that 22-13212 is 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*"). Both IDWR and the court connected Mr. Reid's claim to J.J. Miller's right in the *Rexburg Decree*, even though the legal description did not include Mr. Reid's land. The *Rexburg Decree* described J.J. Miller's place of use on 160 acres which IDWR concluded was impossible to irrigate from Paradise Springs in 1904. (IDWR Ex. 13, p. 173; IDWR Ex. 14) No evidence was offered to contradict the impossibility of irrigating the decreed place of use. IDWR concluded, therefore, that the place of use described in the *Rexburg Decree* was incorrect. IDWR then 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. Mr. Reid and additional SRBA claimants have asserted rights from the second property. No parties have claimed from the first decreed property. The *Director's Report* thus recommended a water right for 5.3 acres on the Reid property with an accomplished transfer relocating the place of use described in the *Rexburg Decree* to J.J. Miller's second property. The *Special Master's Report and Recommendation* concurred.

IDWR recommended reducing the acreage from the 35.6 acres claimed. Based on topography, location of the point of diversion, discussions with residents in the area, and field exams, IDWR determined that only 5.3 acres of Mr. Reid's land could have been irrigated in 1904. The *Special Master's Report and Recommendation* reduced the acreage further by half of the marshy area depicted in red on IDWR Exhibit 18. Thus, the total acreage recommended was 4.5 acres.

III. MR. REID'S ARGUMENT

Mr. Reid urged the court to increase the total acreage and quantity based on two points. First, he argued that an accomplished transfer in 1969 moved part of J.J. Miller's right from the south side of the ditch to the north side onto Mr. Reid's land. He argued that the court should thus find a greater quantity than the 0.16 cfs recommended. (The court is uncertain what

quantity Mr. Reid is seeking. During oral argument, he asked for 1.0 cfs. However, the exhibit Mr. Reid discussed refers to .70 cfs.) Second, he asserted that the J.J. Miller water right was decreed a 1904 priority, but should have an earlier priority of 1901.

A. Quantity

Mr. Reid argued that the quantity for 22-13212 should be increased based on an accomplished transfer he asserted occurred in the 1960s. He argued that during the 1960s, an accomplished transfer moved a portion of J.J. Miller's water right from the north side of Paradise Springs to the south side of Paradise Springs on his property. This argument was not apparent at trial. However, even if Mr. Reid had argued the point, there is insufficient evidence of such a transfer. Mr. Reid cites to Exhibit R-42 to prove the accomplished transfer. Exhibit R-42 sets forth:

The undersigned do hereby affirm that the John J. Miller water right, #22-405 decreed for 2 cfs in the Rexburg Decree, was split between the undersigned as claimed in the SRBA, as follows:

Rex Miller owns 1 cfs (split to .92 for Rex and .08 to R. Bourne)

Don Miller owns .30 cfs

Mike Reid owns .70 cfs

(Exhibit R-42) Exhibit R-42 was signed by Rex Miller, Don Miller, and Michael Reid. At trial, Don Miller testified that R-42 was an agreement between Rex Miller, Don Miller, and Michael Reid. The record does not show that R-42 relates to an accomplished transfer. Exhibit R-42 does not contain any references to a date in the 1960s. Furthermore, there is no evidence showing what portion of J.J. Miller's land such a transfer relates to. There is no evidence that shows how many acres were alleged to have been dried up on the south side to facilitate the transfer, or when the transfer occurred. The signatures on R-42 were dated in May and July of 2006. Nothing in R-42 shows that the document relates to a transfer in the 1960s.

The accomplished transfer statute, I.C. § 42-1425, allows changes to water rights even if those changes violated the mandatory transfer procedures. However, accomplished transfers must meet three requirements:

1. The change must have occurred 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.

In order to show a valid accomplished transfer of part of J.J. Miller's 1904 water right during the 1960s, Mr. Reid would have been required to present evidence of the date of the accomplished transfer. In addition, he would have been required to present evidence of the location from which the water right was allegedly transferred. He would have been required to show that the 1904 water right was appurtenant to the land from which it had been transferred. These prerequisites are particularly important here because IDWR reported that other claimants in the SRBA have claimed rights derivative of the remaining portions of J.J. Miller's rights. These claims were identified as 22-13586, 22-13853, 22-13211, and 22-13509. In order to prevail on this theory of an accomplished transfer, Mr. Reid would need to show the location of land from which he asserted the water was transferred. He would need to show that the transfer occurred before November 19, 1987. He would need to show that no other water rights existing on the date of the alleged change were injured, and he would need to show that the change did not result in an enlargement of the right. The court is aware of no evidence showing that land was dried up on the north side of the ditch and transferred to Mr. Reid's property on the south side of the ditch during the 1960s. The record lacks sufficient evidence of the elements of this accomplished transfer.

B. Priority Date

Mr. Reid asserted that the *Rexburg Decree* made a clerical error in determining the priority of 1904. He asked this court to recognize an earlier priority of 1901. The 1901 date is based on J.J. Miller's homestead claim in that year. Mr. Reid argued that since this court recognized a clerical error in the legal description, it should also recognize a clerical error in the priority date. This Special Master disagrees.

Ample evidence supports the 1904 date. As recounted in the *Order on Summary Judgment*, both 22-13212 and 22-13503 were claimed in the SRBA with a June 1, 1904, priority. The *Rexburg Decree* established the priority as June 1, 1904. The Idaho Supreme Court has held that a prior decree in a private adjudication is binding on the parties to that decree. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). Therefore, the SRBA has generally held that water rights decreed in a prior adjudication are binding on the parties and their successors-in-interest. Parties may not collaterally attack the prior decree in a later adjudication such as the SRBA. The SRBA is not a second opportunity for parties and their successors-in-interest to re-adjudicate previously decreed water rights.

Additionally, the SRBA has previously prohibited parties from re-litigating the priority date established in the *Lemhi Adjudication. Order of Recommitment to Special Master for Specific Findings* (Subcases 74-1080 and 74-15537) Similarly, the prior determination of priority in the *Rexburg Decree* and the doctrine of *res judicata* dictate that the 1904 priority date should not be reopened.

In addition, the 1904 priority cannot be considered a clerical error under I.R.C.P. 60(a). Although clerical errors may be corrected under Rule 60(a), legal errors do not come within the rule. Cases such as *Silsby v. Kepner*, 140 Idaho 410, 95 P.3d 28 (2004), have distinguished between the two types of errors. Clerical errors are those types of mistakes or omissions which are “mechanical in nature which [are] apparent in the record and which [do] not involve a legal decision or judgment by an attorney.” Clerical errors can be characterized as blunders in execution where legal errors consist of instances where a party asks the court to change its mind because it made a legal or factual mistake in making its original determination or asks the court to exercise its discretion in a manner different from the way it was exercised originally.

There is no indication in the *Rexburg Decree* that the determination of the 1904 priority was a clerical error. Nothing in the record shows that the *Rexburg* court’s 1904 priority was a blunder in execution. Mr. Reid alleged that the error was that the *Rexburg* court should have considered the 1901 Homestead Application and awarded a priority of 1901. That type of error is clearly a legal or factual mistake. Legal or factual errors are not clerical errors which can be corrected under I.R.C.P. 60(a). Consequently, the 1904 priority date cannot be corrected under I.R.C.P. 60(a). Based on both *res judicata* and I.R.C.P. 60(a), the Objectors’ *Motion for Summary Judgment* on priority was previously granted. The *Motion to Alter or Amend* as to priority is **denied** for the same reasons.

IV. OBJECTORS ARGUMENT

A. J.J. Miller’s Right

The Objectors argued that the *Special Master’s Report* erred by finding a portion of J.J. Miller’s right from the *Rexburg Decree* was appurtenant to Mr. Reid’s land. The Objectors maintained that none of Mr. Reid’s property was irrigated until 1969. Objectors asserted that both the *Director’s Report* and the *Special Master’s Report* relied on a flawed topographic analysis to conclude that part of J.J. Miller’s right is appurtenant to a small portion of Mr. Reid’s

land. They argued that the decision “assumed” water use based on IDWR’s testimony and topographic maps.

The *Special Master’s Report*, however, did not assume water use based on topographic maps. The finding that water was used on Mr. Reid’s land was based on testimony and other evidence at trial. First, the court examined evidence to show a connection between Mr. Reid’s land and the J.J. Miller right. Water right 22-13212 was claimed as derivative of J.J. Miller’s water right 22-405 from the *Rexburg Decree*. The *Director’s Report* recommended part of the right with a 1904 priority on 5.3 acres and .16 cfs. IDWR determined that Mr. Reid was entitled to part of J.J. Miller’s right in the *Rexburg Decree*, despite the fact that the legal description did not include Mr. Reid’s land. IDWR decided that a valid connection existed between J.J. Miller’s right and Mr. Reid’s land based on topographic analysis showing that the land described in the old decree was impossible to irrigate from Paradise Springs in 1904. No evidence introduced at trial contradicted the impossibility of irrigating the described place of use.

IDWR learned that J.J. Miller had homesteaded a second parcel of land which could be irrigated from Paradise Springs. Mr. Reid currently owns a portion of this second homestead. Mr. Reid and additional SRBA claimants have claimed from J.J. Miller’s 1904 water right at this second place of use. No parties claimed from the first decreed property. (Testimony of Michael Holliday)

IDWR concluded that the decreed place of use was not irrigated from Paradise Springs. Objectors did not dispute that conclusion. IDWR determined that the water right was used on a second place of use owned by J.J. Miller which includes Mr. Reid’s land. Objectors did not dispute that J.J. Miller’s right was appurtenant to this second parcel, but asserted that none of the right was used on the portion now owned by Mr. Reid.

The *Director’s Report* originally recommended 35.6 acres to Mr. Reid in the first *Director’s Report*. (IDWR Exhibit 11) However, once IDWR looked closely at the topography of the land, the point of diversion, and conducted field exams, the acreage was reduced from 35.6 acres to 5.3 acres. The revised *Director’s Report* accordingly reduced the quantity from .5 cfs to .16 cfs. (IDWR Exhibit 12) Historic aerial photography of the place of use, observations from a site visit, and information obtained from residents near the place of use were considered.

The Objectors argued that the *Director’s Report* and *Special Master’s Report* improperly assumed that water was used on Mr. Reid’s land prior to 1969 based on theoretical water use.

Certainly the IDWR agent who testified conceded that his recommendation was not based on personal knowledge of irrigation in 1904 or knowledge of where ditches were located in 1904. However, the *Director's Report* was based on more than just a topographic map and aerial photography. IDWR's investigation also included its analysis of the impossibility of irrigating the land described in the *Rexburg Decree*, the topography of Mr. Reid's land, the point of diversion, the observations of witnesses in the area, historic photography and documents, and visits to the place of use.

In addition to considering the *Director's Report*, the court considered the testimony of Michael Holliday, the documents admitted at trial, and the testimony of many witnesses. Objectors conceded that the testimony of Don Miller supported the finding that Mr. Reid's land was irrigated prior to 1969. Objectors urged the court to change its findings to align with the testimony of Larry Kunz and Todd Dustin. Mr. Kunz and Mr. Dustin testified that they were not aware of flood irrigation on the Reid property prior to 1969. Mr. Dustin believed that the Reid property was simply dry farmed prior to 1969.

However, other witnesses testified that irrigation water was used on the Reid land prior to 1969. J.J. Miller's grandson, Don Miller grew up near Mr. Reid's land and saw some of that property under irrigation prior to 1969. Mr. Miller saw 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 watched his father flood irrigate some pasture on Mr. Reid's property. Mr. Miller said that the ditch which conveyed this water during his childhood was later destroyed when a road was enlarged in the area.

Craig Kunz also grew up in the Paradise Springs area and currently lives next to Mr. Reid's property. During the 1950s and the 1960s, Craig Kunz observed crops growing on the Reid property. Mr. Kunz farmed the Reid land during the 1970s and 1980s. He saw irrigation prior to 1969 when the pump was put in.

The court was persuaded that part of the Reid property was irrigated prior to 1969. This irrigation occurred during the many years that J.J. Miller's grandson observed irrigation, beginning when he was a little boy. Don Miller remembered the location of the ditch delivering the water which ran along the contour lines. Irrigation prior to 1969 was also observed by Craig Kunz who grew up in the area and observed irrigation and growing crops. Notably, the testimony of Don Miller was in concert with the observations and recommendations of agent

Michael Holliday who noted that 5.3 acres could have been irrigated if a ditch had been constructed along the contour lines shown on the topographic map.

The court considered the testimony of eyewitnesses who lived in the Paradise Springs area and observed irrigation for many years prior to 1969. Additional evidence such as portions of the *Rexburg Decree*, historic photographs, existing features including depressions near the springs, and geographic features including contour lines supported the eyewitness testimony. The evidence presented at trial allowed the court to conclude that the J.J. Miller right was appurtenant to this second parcel of land, and that 5.3 acres less half of a marshy area was irrigated. Thus the total acreage for 22-13212 was 5.3 acres less .8 acres identified as half the marshy area shown on IDWR Exhibit 18. The *Special Master's Report* consequently determined that water right 22-13212 has a total acreage of 4.5 acres.

B. Documents C-1, C-3 and C-30

Objectors urged the court to consider three documents they believe show that Mr. Reid's property was not irrigated until 1969. Exhibit C-30 is a USDA aerial photograph of Mr. Reid's property in 1960. IDWR agent Michael Holliday did not notice a ditch running south to Mr. Reid's property in Exhibit C-30. However, Mr. Holliday noted that Exhibit C-30 only showed that a ditch was not present during 1960.

Exhibit C-1 is a "Claim to a Water Right" beneficial use claim filed in 1983 by Don Miller's father (J.J. Miller's son), LeRoy Miller. C-1 claimed a 1904 water right with Paradise Springs as the source. C-1 contains a "remarks" section which says, "It is believed that this water right is on record as a grant of water from Paradise Springs to J.J. Miller as provided in the Rexburg Decree." The map section below the remarks shows an illustration of the place of use on property north of the ditch in section 30. The illustration does not include Mr. Reid's land.

Exhibit C-3 is a second "Claim to a Water Right" beneficial use claim filed in 1983 by LeRoy Miller. C-3 claimed a July 21, 1969, priority with Paradise Springs as the source. The "remarks" section of C-3 also says, "It is believed that this water right is on record as a grant of water from Paradise Springs to J.J. Miller as provided in the Rexburg Decree." The map section below the remarks on C-3 illustrates the place of use, and shows the property south of the ditch in section 30. This illustration includes Mr. Reid's land.

Objectors argued that C-1 and C-3 show that only the land north of the ditch was irrigated by J.J. Miller's 1904 water right. They argued that since C-3 gives the priority date as July 1969

and shows Mr. Reid's land, the court should conclude that the Reid land was not irrigated until 1969. However, that conclusion overlooks other evidence. Don Miller understood C-3 to be a claim his father filed to document land south of the ditch that was irrigated with J.J. Miller's water right. That is why the remarks on C-3 also stated, "It is believed that this water right is on record as a grant of water from Paradise Springs to J.J. Miller as provided in the Rexburg Decree." Don Miller testified that the date of July 21, 1969, was placed on the claim to indicate the date that the pump was first put in to facilitate pumping of the water right. The remarks on C-3 about J.J. Miller's water right from the *Rexburg Decree* make sense if C-3 was intended to claim the 1904 water right, but also showed the changes made in 1969. The remarks about the *Rexburg Decree* are inconsistent with the notion that C-3 was a claim for water first put to beneficial use in 1969. If that was the case, there should have been no reference to J.J. Miller's water right. The 1969 date on C-3 must be considered along with the remarks about the *Rexburg Decree*, the testimony about changes made with the pump placement in 1969, and the testimony about Mr. Reid's land being irrigated prior to 1969. When taken in context, it appears that C-3 was intended to document irrigation based on J.J. Miller's water right with the additional changes made in 1969 to the irrigation practices.

In conclusion, the evidence supports the finding that part of Mr. Reid's land was irrigated with the 1904 J.J. Miller water right.

C. Forfeiture

Objectors argued that if part of Mr. Reid's property was irrigated in the early 1900s, the water right was forfeited based on nonuse for a period of five years. It is uncertain what time frame Objectors asserted as the period of forfeiture. Objectors relied on the same evidence asserted to show the Reid property was never irrigated prior to 1969. However, the court was persuaded by the testimony of Don Miller, Rex Miller, and Craig Kunz that Mr. Reid's land was irrigated prior to 1969. Therefore, the court declines to find forfeiture which must be shown by "clear and convincing" evidence.

V. CONCLUSION

Mr. Reid argued that the court should recognize an accomplished transfer which allegedly occurred in 1969. However, the record lacked information about the location of the land from which this accomplished transfer came, and lacked information about how this

accomplished transfer might impact other claims from the J.J. Miller right. Consequently, the *Motion to Alter or Amend* is **denied** as to the asserted 1969 accomplished transfer.

Mr. Reid asserted that the court should find the *Rexburg Decree* court made a clerical error in finding a 1904 priority date for J.J. Miller's water right. Mr. Reid argued that he was entitled to an earlier 1901 priority based on J.J. Miller's homestead in that year. However, there was no indication that the finding of 1904 was a clerical error. If the finding of 1904 was an error, it could only have been a legal error which this court cannot correct under I.R.C.P 60 (a). Furthermore, concepts of *res judicata* do not allow a party to re-litigate the priority date under these circumstances. Thus, the *Motion to Alter or Amend* is **denied** on the question of priority.

The Objectors argued that the *Special Master's Report* improperly assumed irrigation of Mr. Reid's land based on IDWR's topographic map and expert opinion that 5.3 acres could be irrigated from Paradise Springs. However, the *Special Master's Report* relied on testimony of witnesses who observed irrigation on Mr. Reid's property prior to 1969. In addition, exhibits including the *Rexburg Decree* and later documents show a connection between the 1904 water right and the Reid land. The water right claimed by Mr. Reid is more than 100 years old, and the water use originated before any of the parties and any of the witnesses were alive. Although there was conflicting testimony about whether the Reid property was irrigated prior to 1969, old water rights must be evaluated based on the evidence available.

After considering the pleadings, testimony, evidence, and arguments of the parties, the *Objector's Motion to Alter or Amend* is **denied**. Water right 22-13212 was properly derived from J.J. Miller's right in the *Rexburg Decree* and should have a total of 4.5 acres with a 1904 priority.

No parties filed a *Motion to Alter or Amend* with regard to the finding of disallowance of claim 22-13503. Consequently, there are no changes to the recommendation that water right 22-13503 **not be confirmed** in any partial or final decree.

The *Motions to Alter or Amend* for 22-13212 are **denied**. Consequently, there are no changes to the elements previously recommended in the *Special Master's Recommendation for Partial Decree*. (July 30, 2010)

DATED October 1, 2010.


BRIGETTE BILVEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON
MOTIONS TO ALTER OR AMEND was mailed on October 01, 2010, with
sufficient first-class postage to the following:

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