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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
APR - 8 2011	
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 02-2318A
	)	(Wilkerson)
	)	
Case No. 39576	)	ORDER DENYING MOTION FOR
	)	RECONSIDERATION AND
_____	)	MOTION TO ALTER OR AMEND

Background

Special Master Report and Recommendation

On August 25, 2010, the Special Master entered an *Order Granting Motion for Summary Judgment and Special Master Report*. The Special Master recommended William and Imogene Wilkerson's license-based claim 02-2318A to irrigate their 13.3 acre parcel ("13 acre parcel") from the Snake River be decreed as recommended by IDWR with its point of diversion on a 36.7 acre parcel ("37 acre parcel") owned by Objectors Diane and Charles Kritz and Raymond C. Barker, Jr. The Objectors' allegations the Wilkersons' water right should not exist ("Abandonment/Non-use") were rejected.

In the *Report*, the Special Master found the point of diversion has not been administratively changed since the license to irrigate the entire 50 acres (13 acres + 37 acres) was issued in 1972. Next, arguments of forfeiture or abandonment before October 7, 1988 – when Ms. Jackson and the Lazeliers filed their claim 02-2318 in the SRBA to irrigate the 50 acres – were deemed superfluous. After that date, the law of the SRBA case is that the filing of the claim tolled the five year statutory forfeiture period until a partial decree is entered and that has not been done. Finally, the Special Master held the Objectors cannot support their allegation the Wilkersons abandoned their water right for non-use since they failed to prove intent to abandon.

Objectors' Motions for Reconsideration and to Alter or Amend

On September 8, 2010, the Objectors filed their *Motion for Reconsideration*. They alleged four errors in the Special Master's *Report*. First, they cited an error in not granting their earlier *Motion to Strike*. Next, the Objectors said issues relating to doctrines of abandonment, waiver and laches are factual; hence, Mr. Wilkerson's *Motion for Summary Judgment* must be denied because of material facts in dispute. Then they alleged the doctrine of forfeiture should apply in this subcase. Finally, they suggested the point of diversion element of Mr. Wilkerson's water right should include a remark "that no right of way or easement is conferred across the property of another."

In support of their last point about inclusion of a remark under the point of diversion element, the Objectors submitted the *Affidavit of Norman C. Young*, a former administrator with IDWR. He wrote:

Based on my experience and knowledge, it is my understanding that IDWR has used, and continues to use this routine practice to include in water right licenses or similar instruments where the applicant does not own the point of diversion, place of use or locations along the conveyance system, language to the effect that "this grant of a water right does not grant any right of way or easement across the lands of another.

Young Affidavit, at 2.

On September 28, 2010, the Objectors filed their *Motion to Alter or Amend* with the same arguments from their earlier *Motion for Reconsideration*.

Claimants' Response

The Wilkersons filed their *Response to Objectors' Motion to Alter or Amend* on October 8, 2010. They argued the *Motion* should be denied on both procedural and substantive grounds. First, they said the Objectors' *Motion* was untimely filed 13 days late and second, the *Motion* is without merit. There was substantial evidence the Objectors and their predecessors-in-interest denied the Wilkersons access to the claimed point of diversion and there is no basis to strike portions of affidavits on that issue.

Then, the Wilkersons wrote the Objectors failed to prove intent to abandon their water right and mere allegations of waiver or laches did not create genuine issues as to any material facts. Finally, the Wilkersons said the point of diversion remark suggested by the Objectors "is a

general statement of law and is not necessary to define or efficiently administer the water right.” Wilkersons’ *Response*, at 5.

Objectors’ Brief

On October 12, 2010, the Objectors lodged their *Brief in Support of Objectors’ Motion to Alter or Amend*. They repeated their suggestion of a remark that the partial decree does not confer the right of access across the property of another.

Objectors’ Reply Brief

The Objectors lodged their *Reply Brief on Motion for Reconsideration and Motion to Alter or Amend* on January 31, 2011. They argued their *Motion to Alter or Amend* was timely filed; their *Motion to Strike* portions of certain affidavits should have been granted; inferences in favor of Objectors and disputed issues of material fact merited denial of summary judgment; and a remark that the partial decree does not grant an easement or right of access is necessary to clarify the point of diversion element and to administer the water right.

Hearing

A hearing on the Objectors’ *Motion for Reconsideration and Motion to Alter or Amend* was held by telephone conference on February 3, 2011. Dana L. Hofstetter and Debra K. Ellers appeared for Objectors; Josephine P. Beeman and Jane M. Newby appeared for the Wilkersons; and Andrea L. Courtney appeared for IDWR, along with Jan Shurte.

Discussion

Motion to Strike

The Objectors allege their first concern is the Special Master’s failure to grant their *Motion to Strike*. The Special Master considered the *Motion* “no longer relevant in light of the above findings of material facts wholly supported by the objectors’ own pleadings and affidavits.” Those material facts were that the Objectors claimed forfeiture or abandonment for nonuse when they, the Objectors, prevented its use. The record is clear that the Objectors’ own documents “demonstrated their consistent and unyielding efforts to bar anyone else access to the

Snake River point of diversion. . . .” The decision to consider the Objectors’ *Motion to Strike* irrelevant, or essentially moot, was reasonable given the evidence of record.

Material Facts in Dispute

The second error cited by the Objectors was this: their allegations that the doctrines of abandonment, waiver and laches to demonstrate the Wilkerson’s abandoned the water right created material facts in dispute. Hence, summary judgment must be denied.

The Wilkersons correctly pointed out that mere allegations do not create genuine issues as to material fact. As discussed in the *Order Granting Motion for Summary Judgment and Special Master Report and Recommendation*, each of the doctrines was fully addressed in light of properly admitted evidence, particularly that offered by the Objectors themselves. There was no error in finding a lack of material facts in dispute and granting the Wilkersons’ *Motion for Summary Judgment*.

Forfeiture

The Objectors’ third alleged error was that forfeiture should apply in this subcase. The law of the SRBA case is clear on this point. The Objectors’ predecessors-in-interest filed the claim for water right 02-2318 in 1988, so there can be no argument of forfeiture of any part of that water right *before* that date. *After* that date, the simple act of filing the claim tolled the running the five year statutory period until a partial decree is entered by this Court. Simply stated, forfeiture is not a viable argument in these circumstances.

Point of Diversion Remark

The Objectors urged the inclusion of a remark that the partial decree does not confer the right of access across the property of another – either a right of way or easement. For argument sake, the Special Master will consider this “new” issue as an extension of their 2007 *Objection* alleging abandonment.

Mr. Young’s *Affidavit* stating it is routine practice for IDWR to include such a remark in “water right licenses or similar instruments” is well taken. “The general rule is that an appropriative right *initiated* in trespass on private land is voidable as against the owner of the land [emphasis added].” Wells A. Hutchinson, *Water Rights in Nineteen Western States*,

vol. I, at 265. “It is the settled rule of decision in this state, that a water appropriation or permit to appropriate the public waters of the state can not be acquired through trespass.” *Idaho Power Co. v. Buhl*, 62 Idaho 351, 357, 111 P.2d 1088 (1941); also see *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974).

The Objectors’ arguments in favor of such a remark are not applicable here because we are not dealing with an appropriation or permit initiated in trespass. The water right was licensed in 1972, to irrigate 50 acres (including the Wilkersons’ 13 acre parcel) with the Snake River as the point of diversion. In 1988, when the SRBA claim was filed, the same point of diversion was described.

There was no trespass; therefore, there is no reason to include a remark about right of access as might be routine for a newly acquired water right. The point of diversion for water right 02-2318A is the Snake River. The sole issue yet to be determined, as stated by Judge Thomas J. Ryan in Owyhee County District Court, is whether the Wilkersons are entitled to a statutory right of way pursuant to I.C. §42-1102.

Order

THEREFORE, IT IS ORDERED that the Objectors’ *Motion for Reconsideration* and *Motion to Alter or Amend* are **denied**.

DATED April 8, 2011.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO ALTER OR AMEND was mailed on April 08, 2011, with sufficient first-class postage to the following:

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