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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 30 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	)	ORDER ON MOTION TO STRIKE
	)	AND MOTION FOR SUMMARY
Case No. 39576	)	JUDGMENT
	)	
	)	SUBCASE NOS.: 37-296A, 37-717, and
	)	37-1216
_____	)	

I. PROCEDURAL BACKGROUND

The City of Hailey (hereafter "Hailey") filed claims in the SRBA for water rights 37-296A, 37-717, and 37-1216. The Idaho Department of Water Resources filed *Director's Reports* recommending the rights. Indian Creek Ranch Owner's Association Inc. (hereafter "Homeowners") filed *Objections* to the original recommendations. Hailey and the Homeowners are competing water users on the source, Indian Creek. *Responses* were filed by Big Wood Canal Co. and Victor and Dana Hofstetter.

IDWR filed *Amended Director's Reports* for 37-296A, 37-717, and 37-1216 on September 30, 2010, making changes to some of the elements. Specifically, the *Amended Director's Reports* did not recommend a year-round season of use. After the *Amended Director's Reports* were filed, Hailey filed *Objections*. The Homeowners filed *Responses*.

On December 17, 2010, IDWR filed *Supplemental Director's Reports* explaining the basis for the recommendations. The *Supplemental Director's Reports* included documents showing that IDWR's recommendations relied on prior decrees and chain of title documents.

The Homeowners filed a *Motion for Summary Judgment* and a *Memorandum in Support of Indian Creek Ranch Owner's Motion for Summary Judgment*. In addition, the

Homeowners filed a *Motion to Strike Affidavit and Exhibits* and the *Affidavit of Candice McHugh*.

Hailey did not file a response brief in opposition to the *Motion for Summary Judgment*. The *Affidavit of Patrick Brown* was filed with attachments.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). Disputed facts are construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006).

A party may present oral argument on summary judgment, even if a brief is not filed. *Gem State v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However, a party must direct the court's attention to the portions of a deposition it argues are relevant. *Brown v. Matthews Mortuary*, 801 P.2d 37 (1990).

Idaho Rule of Civil Procedure 56(e) requires that affidavits filed in opposition to a motion for summary judgment set forth facts which would be admissible in evidence. In addition, IRCP 56(e) requires the affidavits "must set forth specific facts showing that there is a genuine issue for trial." Admissibility of affidavits under IRCP 56(e) is a threshold question which is analyzed before applying liberal construction and reasonable inferences when reviewing a motion for summary judgment. *Edmunds v. Kraner*, 142 Idaho 867, 871 (2006).

III. MOTION TO STRIKE

The Homeowners filed a *Motion to Strike Affidavit and Exhibits* seeking to strike the *Affidavit of Patrick Brown* and the attached exhibits. The *Motion to Strike* asserted that the *Affidavit* and exhibits fail to establish proper foundation for admissibility.

The Homeowners' main objection was that the documents were offered without a brief and thus lacked a showing of relevance. Furthermore, the Homeowners stated that Exhibits 12-14 related to subcase 37-7854, a hydropower right claimed by Hailey. Exhibit 15 related to subcase 37-28F claimed by Red Devil Mountain Homeowners.

The Homeowners objected to Exhibits 3-8 because they were not produced in discovery. Exhibits 3-8 were historic newspaper articles dating from 1913 which referred to Hailey's purchase of a water system from the Idaho State Life Insurance Company. The Homeowners argued that the documents were irrelevant, contained hearsay, and were not produced during discovery. Finally, the Homeowners sought to strike some 800 pages which included a deposition transcript, videos and deposition exhibits.

At the hearing, the court denied the *Motion to Strike* on Exhibits 1 and 2. Hailey explained the relevance of the documents. The *Motion to Strike* Exhibits 10-14 was similarly denied. Exhibits 3-8 were not produced in response to discovery requests for "any documents relating to the claim." Since Exhibits 3-8 were historic documents which clearly related to Hailey's claim, they should have been produced in answer to discovery. The *Motion to Strike* is granted on Exhibits 3-8.

The court **denies** the *Motion to Strike* regarding the attached 800 pages of deposition transcripts, videos, and deposition exhibits. There was no showing that they were irrelevant or inadmissible. However, the Homeowners correctly noted that the 800 pages were provided without a brief. In addition, Hailey could not answer the court's request to cite to specific portions of the transcripts. Providing the transcripts without referring to specific portions is unfair to opposing counsel and unhelpful to the court. Nevertheless, the transcripts and documents were not shown to be irrelevant or otherwise inadmissible. Therefore, they were not stricken. Although, the transcripts were not stricken, there was no showing of the needle in the haystack. It is noted that Rule 30(f)(4) requires that only those portions of a transcript or deposition to be used shall be submitted to the court. Failure to focus on particular portions of deposition transcripts may not render them inadmissible, but it greatly reduces their persuasive value.

IV. DISCUSSION

The Homeowners argued that summary judgment is appropriate for all three (3) subcases because no genuine issues of material fact remain. The Homeowners asserted that the prior decrees, chain of title documents, a 1983 contract, and the *Amended Director's Reports* all support their position on summary judgment. They argue that no genuine issues of material fact are in dispute regarding the quantity and season of use elements. Consequently, the Homeowners asked for a ruling that these rights be recommended

according to the *Amended Director's Reports*. The *Amended Director's Reports* recognize Hailey's right to divert 2.62 cfs during the irrigation season under 37-269A as the successor to Nancy Tucker. The *Amended Director's Reports* also recognize Hailey's right to 2.62 cfs combined during the non-irrigation season under 37-717 and 37-1216.

A. Director's Reports

The elements recommended in the *Amended Director's Reports* are *prima facie* evidence of the elements of these water rights. The *Amended Director's Reports* conclude the following:

37-296A: The *Amended Director's Report* for 37-296A recommended 2.62 cfs with an irrigation season from April 15 to October 31.

37-717: The *Amended Director's Report* for 37-717 recommended 1.72 cfs from November 1 to April 14.

37-1216: The *Amended Director's Report* for 37-1216 was for .90 cfs from November 1 to April 14. Hailey did not claim a year-round season of use for 37-1216.

B. Prior Decrees

Hailey's rights are based on two prior decrees: *Caldwell and Alturas Water Co. v. Tucker, et. al.* (4th Jud. Dist., Blaine County, December 24, 1900) (hereafter "*Tucker Decree*") and *S.C. Frost et. al. v. Alturas Water Co. et. al.* (4th Jud. Dist., Lincoln County, December 13, 1909) (hereafter "*Frost Decree*"). The *Tucker Decree* is helpful in understanding the sequence of evidence considered by IDWR. However, the *Tucker Decree* was superseded by the subsequent *Frost Decree* which is the decree to which the court looks to begin its analysis of these rights.

37-296A (Derived from Nancy Tucker's right): In 1900, the *Tucker Decree* awarded this right to Nancy Tucker and also awarded a right to the Alturas Water Company. The *Tucker Decree* described the two rights as follows:

That the defendant, Nancy M. Tucker, is the owner and entitled to the possession and use of all the waters of Indian Creek, a stream flowing into the Easterly side of Wood River Valley two miles above the town of Hailey, in Blaine County, Idaho. That neither of the plaintiffs has any right, title or interest in or to said water or any part thereof. EXCEPT AND PROVIDED, however, that the Alturas Water Company has the right and is entitled to the use, during that part of the year when said waters are not necessarily and properly used and in use for the purpose of irrigation on

the lands of said Nancy M. Tucker and the lands lying along said creek above the reservoir of said water company, of as much of said water as its pipe line will now convey from its said reservoir delivered through its system of mains and service connections to the town of Hailey Which is hereby adjudged and decreed to it, to be used by it in said quantity and at the time stated.

Tucker Decree; Supplemental Director's Report attachment F.

The Homeowners argued that the *Tucker Decree* granted Nancy Tucker a water right during the irrigation season. This argument is based on the sentence describing Alturas Water's right: "[T]he Alturas Water Company has the right and is entitled to the use during that part of the year when said waters are not necessarily and properly used and in use for the purpose of irrigation on the lands of said Nancy M. Tucker" Thus, the Homeowners conclude that Nancy Tucker's use was decreed during the irrigation season, and that Alturas Water's use was decreed during the non-irrigation season.

Hailey argued that the *Tucker Decree* language did not limit Nancy Tucker's right to the irrigation season. Hailey asserted that the language gave Nancy Tucker a primary right and gave Alturas Water a subordinate right available when Tucker was not using water.

The Tucker right was confirmed in the *Frost Decree* to Hailey Water & Power Co. and was described as follows:

Hailey Water & Power Company	All of creek	Exclusive right, (as successor of Nancy M. Tucker) Indian Creek
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The *Findings of Fact and Conclusions of Law* in the *Frost Decree* explain the season of use more directly with the following language:

[D]uring the winter season [Alturas Water Co.] has . . . used a sufficient amount of water from Indian Creek . . . when the same was not needed or required by the parties to whom it was decreed in the said action of *Caldwell, et.al. vs. Tucker et.al.*

The *Frost* Court used clear language in describing the period of use. The *Frost Decree* described the former Tucker right as an irrigation right.

37-1216 (Derived from Alturas Water's right): This right is derived from Alturas Water Company's right in the *Tucker Decree*. The *Tucker* language establishing

this right is the same language quoted above. The Homeowners asserted that the *Tucker Decree* described the season of use during the non-irrigation season. The Homeowners asserted that the non-irrigation season was confirmed in 1909 by the *Frost Decree*:

That the Alturas Water Company be and it is hereby awarded the right to the use of a certain amount of the waters of Indian Creek, sufficient to fill its water pipes of their present ten inches in diameter capacity, and that it is entitled to the use of such right during the Winter season of each and every year when it is unable to obtain its decreed right of 100 inches through the so-called Riley ditch, and that the increased amount above the 45 inches awarded to it in the decree in the case of Caldwell, et. al., vs. Tucker, et. al., shall date from the first day of August, 1907.

Frost Decree.

The Homeowners argued that the *Frost Decree* clearly expressed that the Alturas Water right had a non-irrigation, winter season of use. Hailey argued, however, that the *Frost Decree* language did not limit the Tucker use to the irrigation season.

The *Findings of Fact and Conclusions of Law* in the *Frost Decree* described the relationship between 37-1216 and another right from the Riley ditch:

That the Alturas Water Company purchased, and has since the month of October, 1883, continuously used the right to the use of 100 inches of water, to flow through the so-called Riley ditch, having its source in Big Wood River, during all seasons of the year when it is safe or practicable to run water through the same, for the purpose of supplying the inhabitants of the village of Hailey with water for domestic and other purposes; and that during the Winter season it has for more than twenty five years last past used a sufficient amount of water from Indian Creek to fill its pipes to the capacity of said pipes, when the same was not needed or required by the parties to whom it was decreed in the said action of Caldwell, et al., vs. Tucker et al., for the purpose of supplying the inhabitants of the village of Hailey with water for domestic and other purposes; and that said pipes were increased from 7 inches to ten inches in diameter in the year 1907.

Frost Decree (emphasis added). Hailey asserted that this language provides Alturas Water a right to utilize water when the Tucker right is not in use. Thus, Hailey argued the Alturas Water right is a subordinate right without a specific season. However, the Homeowners argued that the language “during the Winter season” illustrates the seasonal nature of the right.

37-717 (Later Alturas Water right): This water right was first recognized in the later *Frost Decree*. The *Frost Decree* recognized the additional water put to use by the Alturas Water Company after the *Tucker Decree*. The *Frost Decree* confirmed the earlier water right (37-1216) and identified its quantity. The *Frost* Court said the earlier Alturas Water right was based on a 7-inch pipeline with a quantity of 45 inches of water. The *Frost Decree* held that Alturas Water expanded its system in 1907 to use a bigger 10-inch pipe. The additional capacity of the pipeline was not quantified, but was given an August 1907 priority:

That the Alturas Water Company be and it is hereby awarded the right to the use of a certain amount of the waters of Indian Creek, sufficient to fill its water pipes of their present ten inches in diameter capacity, and that it is entitled to the use of such right during the Winter season of each and every year when it is unable to obtain its decreed right of 100 inches through the so called Riley ditch, and that the increased amount above the 45 inches awarded to it in the decree in case of *Caldwell, et al., vs. Tucker, et al.*, shall date from the first day of August, 1907.

Frost Decree (emphasis added).

The *Frost* Court clearly established 37-296A as the successor to Nancy Tucker and described both 37-1216 and 37-717 as “winter season” rights. Any ambiguity in the earlier *Tucker Decree* is thus largely academic, as it is the more recent *Frost* language which controls.

C. Chain of Title

The Homeowners argued that the chain of title documents support the quantity elements in the *Amended Directors Reports*. IDWR included chain of title documents with the *Supplemental Director’s Reports*.

37-296: The *Frost Decree* decreed this right to Hailey Water & Power Co. as the successor of Nancy Tucker. Chain of title documents show that on April 17, 1913, the Idaho State Insurance Co. obtained the assets of Leo and Sarah Cramer in a sheriff’s sale. (*Supplemental Director’s Report*, Attachment K.) The assets included the real property “together with all water and water rights, ditches and canals, in any wise connected with or in any manner appurtenant to said land.”

On October 11, 1913, the Idaho State Life Insurance Co. deeded all but 131 inches of 37-296 to David Devine. (*Supplemental Director's Report*, Attachment L.) The deed to David Devine reserved 131 inches of Indian Creek water.

There is hereby expressly reserved and excepted from this conveyance 131 inches of the waters of Indian Creek, being a portion of the waters of Indian Creek decreed to Hailey Water & Power Company in the decree above mentioned, the said reserved water being taken from certain springs which are the source of said Indian Creek, to supply the City of Hailey and the inhabitants thereof with water for domestic, irrigation and municipal purposes, which right shall be prior and paramount to any rights acquired by second party in the waters of Indian Creek under this conveyance.

Supplemental Director's Report, Attachment L.

On September 1, 1915, the Idaho State Life Insurance Co. deeded its reserved 131 inches of Indian Creek water to the Hailey Water Company. (*Supplemental Director's Report*, Attachment M). The original conveyance mistakenly listed the reserved quantity as the first 130 miner's inches. A correction deed was recorded July 26, 1919, showing the conveyance was 131 inches. The corrected deed described the right:

A water right of 131 miners inches of the waters of Indian Creek, being a portion of the waters of Indian Creek decreed to Hailey Water and Power Company by decree of the District Court of the Fourth Judicial District of the State of Idaho, in and for Lincoln County, in an action entitled S. C. Frost, et al, versus Alturas Water Company, et al.

Supplemental Director's Report, Attachment M.

On November 6, 1926, the assets of the Hailey Water Co. were deeded to the Peoples West Coast Hydro Electric Co. (*Supplemental Director's Report*, Attachment O). This conveyance included the first 131 miner's inches from Indian Creek which had been decreed to Hailey Water & Power Co. (*Supplemental Director's Report*, Attachment O).

On August 31, 1944, the West Coast Hydro Electric Co. gave Hailey a deed to the first 131 miner's inches from the *Frost Decree*. (*Supplemental Director's Report*, Attachment Q).

Also the right to the use of the first 131 miner's inches flowing from the springs forming the sources of Indian Creek identified as a portion of the water of said creek decreed to Hailey Water & Power Company, by judgment entered in the District Court of the Fourth Judicial District of the

State of Idaho in and for Lincoln county, in a case entitled S.C. Frost et al
v. Alturas Water Company et al.

Supplemental Director's Report, Attachment Q.

In summary, the *Supplemental Director's Report* for 37-296, 37-1216 and 37-717 and attachments show a clear chain of title, beginning with Nancy Tucker and Alturas water and ending with the City of Hailey, for 131 inches of water.

D. 1983 Agreement

In September 1983, the City of Hailey and the Indian Creek Ranch Owners Association entered into an agreement which described the existing water rights of the parties. Paragraphs 2) and 2a) described the previously decreed rights:

2. Decreed Water Rights. The parties acknowledge that the City owns and has priority to 131 miner's inches of the waters of Indian Creek Spring which may be diverted for "municipal" purposes on a year-round basis. The Owners are entitled to and were decreed all of the water over and above the 131 inches for irrigation and other beneficial uses during the irrigation season and for stock water and other related non-irrigation season uses. The parties further recognize that all of the waters of Indian Creek Spring and Indian Creek are presently utilized for beneficial purposes during the irrigation season.

The 1983 Agreement recognized that the Homeowners would subordinate its right to Hailey's 131 inches.

2a. The parties acknowledge that in a year where there is not more than 131 miner's inches available in the waters of Indian Creek Spring at the City's pipeline diversion, the City would be entitled to all of its 131 miner's inches, before the Owners are entitled to any water.

E. Homeowners' Argument

The Homeowners argued that the language in the *Tucker* and *Frost Decrees* defined 37-296A, Nancy Tucker's right, as an irrigation right. The Homeowners argued that 37-1216, and 37-717, Alturas Water's rights, were non-irrigation or winter season rights. The Homeowners argued that 37-296A was quantified at 131 miner's inches, and 37-1216 and 37-717 together were quantified at 131 miner's inches. The rights were used at different times of year, and with all three rights together, Hailey may use 131 inches all year.

F. Hailey's Argument

Hailey argued that the *Tucker* Court did not limit Nancy Tucker's right to the irrigation season. Hailey argued that the *Tucker Decree* defined Nancy Tucker's right as a primary year-round right and described the Alturas Water right as a subordinate right available when the Tucker right was not in use.

Hailey argued that even if the *Tucker Decree* had established Nancy Tucker's right as an irrigation season right and Alturas Water's right as a non-irrigation season right, those distinctions were eliminated when the Tucker and Alturas Water rights were unified by a purchase in 1913.

V. CONCLUSION

Hailey's argument overlooks the language of the later *Frost Decree*, the chain of title documents, and the 1983 Agreement. Specifically, the *Tucker Decree* language grants Nancy Tucker a right during the irrigation season and Alturas Water two rights during the non-irrigation season. Hailey argued that the *Tucker* language really granted Nancy Tucker a primary right and Alturas Water a subordinate right. Both the *Tucker Decree* and the *Frost Decree*, however, described the Alturas Water right as "during the winter season." Thus both decrees describe the Nancy Tucker right as an irrigation season right.

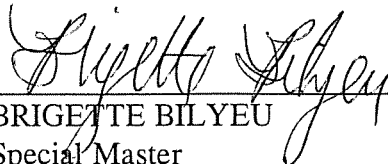
Hailey's quantity argument is similarly undermined by the earlier decrees, the chain of title documents, and the 1983 Agreement. Those documents consistently describe the rights with 131 miner's inches or 2.62 cfs.

There are no genuine issues of material fact as to the season of use. Both past decrees describe the Nancy Tucker right as an irrigation right and the Alturas Water rights as winter season rights. The facts show 131 miner's inches (2.62 cfs) were decreed to Nancy Tucker for right 37-296A in the *Frost Decree*. Water rights 37-1216 and 37-717 were combined for 131 miner's inches in the winter season. Both the 1983 agreement and the chain of title documents support the quantity of 2.62 cfs year round when the three rights are used. No genuine issue of material fact remains as to quantity. More recently, the *Amended Director's Reports*, to which *prima facie* weight attaches, establish renewed support for these elements. Hailey is the successor in interest to Nancy Tucker under water right 37-296A. Accordingly, Hailey is entitled to divert 131 miner's inches or 2.62 cfs during the irrigation season. Hailey obtained Alturas Water's rights for 37-1216 and

37-717. Both rights were unambiguously described in the *Frost Decree* as winter season rights. The quantities determined in *Frost* were 45 inches or .90 cfs for 37-1216 and 1.72 cfs for 37-717.

The *Motion for Summary Judgment* is **granted**. Although the court determined that Hailey's argument does not survive the *Summary Judgment Motion*, nothing in this decision precludes an assertion of water use by Hailey which is not based on these prior decrees.

Dated: August 30, 2011.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT was mailed on August 30, 2011, with sufficient first-class postage to the following:

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