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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

IN RE SRBA

CASE NUMBER 39576

Response to Order:
SUBCASES 22-11639,
22-13509, 22-13584

BACKGROUND

After the Reid trial, there was a settlement conference held where almost every holder of Paradise Springs rights was represented in an effort to settle the differences concerning rights on Paradise Springs and Paradise Creek. Of the right holders on Paradise Springs/Creek, only Gary Zohner and Susan Aldeen were absent at this meeting. In general, the parties at the meeting were in a compromising mood, and many things seemed to get settled. Because of the large number of participants and claims, and large number of objections, it was important that as much headway as possible get completed in a short conference. The agreements that were reached required many steps by many parties to achieve the result and to then put the disagreements in the past. Over the better part of a year, the parties worked their way through the system, one step at a time, in a 'global' effort to get this agreement through. There were many hearings and even more status conferences. Many times, parties missed a conference or a hearing that involved them in some way, but because we were all working towards the same goal, mostly this was irrelevant.

Although the Special Master has spent some time and effort admonishing me for missing a meeting in September, and trying to suggest that I have shown anything else than due diligence because of this, in fact this is an inaccurate and unfair characterization. The idea that I have operated outside of diligence or good faith is wrong. In July, I worked more than 550 hours and in August, I worked almost 520 hours to get my work done on the farm. In September, I worked less than 430 hours. This was not my plan, but a situation that arose due to uncontrollable circumstances. It is my primary responsibility to make sure that the work gets done on the farm. Any of the attorney's involved, faced with this kind of work schedule, would have

postponed the hearings and conferences, or like Mr. Harris, just not attended. I had every right to try to postpone or delay any of these hearings or conferences, but I didn't because I wanted the agreement to go through, and as soon as it possibly could.

The status conference in September was to update everyone on how close we were to a solution. At the previous hearing, I had been advised that IDWR was preparing the final documents for me to sign. I had barely received these documents by the time of the status conference and therefore was unprepared to say anything on the record, since I had not reviewed the paperwork. I had looked for the paperwork on the internet about a month after the previous July hearing; I didn't find any of the paperwork at that time. Even so, I thought about my responsibility to show up at this status conference, and would have called in, even though I was out of state, except for a family situation that required my immediate attention. This family issue was the reason for my trip in the first place.

The reason I did not get the documents in a timely fashion was due to the negligence of the US Post Office. This issue apparently began in late winter of 2011 and continued until mid September of 2011. It took me until June to figure out something was wrong with the mail, and I wrote a letter to the USPS in Salt Lake City, dated June 30th. That complaint was answered by the USPS in a letter dated August 9, 2011. I did not receive this letter until mid September, with another stack of mail that had apparently accumulated at the Post Office. This happened just before my trip, which included the status conference of September 21, 2011. I did not get a chance to go through the stack of mail before I left.

When I returned, I went through everything and found the documents I had been waiting for from IDWR. They were postmarked in late August 2011. I had spoken to Don Miller, who had attended the status conference of September 21, and I knew that time was of the essence and that there was another such conference on October 12, about two weeks away. As I went through the documents, I noticed that everything appeared to be consistent with the agreement except for my right, 22-13212. The language concerning every other right involved had been subordinated to Mr. Budge's clients water rights specifically; my water right had been subordinated to every water right in the state. Already, IDWR and Mr. Budge had initialed their acceptance of this. The agreement concerning my water right was just as

specific as all the other rights, and the subordination clause should have read the same.

I called Ray Williams and left a message as soon as I saw the problem. Several days later, I received this email from Mrs. Courtney:

Mike~

Thank you for your voicemail. Ray forwarded your message to me. I can understand your concern about the breadth of the condition. As you'll recall, this condition is a result of the settlement discussions and global settlement for the Paradise Springs subcases. It was the Department's understanding that the condition should be reflected as written. The Department has no objection, however, to your revised version of the condition, but it will also require acceptance by Cedron, Trees and Teton Rainbow Ranches. Those parties have already signed off on the current version of the SF5. Therefore I ask that you discuss the matter with TJ Budge and reach consensus on the language of the condition.

Once agreement is reached, the Department will prepare a revised SF5 for circulation. In the interests of time, we propose to circulate any revised SF5 via email. I will be out of the office Monday and Tuesday of next week so please include Ray on any email correspondence.

Andrea

At the hearing on October 12th, Mrs. Courtney added to this information by stating that what she remembered from the settlement conference was that my right was to be subordinated to every other right in the state. What she has never stated in writing or testimony is, why the state was going from memory or "understanding" when there is a written agreement with signatures that could be consulted. I never received the benefit of three years of legal education, nor do I spend my days practicing law, but even I know that you need to go from what is written and has been signed, not from your memory or understanding. In fact, I phoned Mr. Budge after getting Mrs. Courtney's email, and he stated that he knew that my right should only be subordinated to his clients; however, when I emailed him the documents to correct and sign, they never were returned. This situation was made worse due to the Court's deadline that I sign off on everything and that all paperwork be in by October 12th or my Motion to Set Aside Partial Decree would be denied.

During the afternoon of October 11th, I emailed Mr. Budge that I was dissolving the agreement because I had not received what I was to get out of

the agreement and that I wouldn't sign what was offered to me by the state because it did not comply with the agreement. I have never dissolved an agreement before, and the procedural issues surrounding the subcases were not readily apparent to me at that time. The next morning, there was a status conference at which I announced the dissolution of the agreement surrounding my right and I withdrew my Motion to Set Aside Partial Decree. Mr. Budge asked the Special Master to withdraw it with prejudice, and although I objected, I agreed that I wasn't interested in bringing any more issues with regard to 22-13212 in front of the court. The Special Master indeed withdrew this with prejudice. This was unexpected as well, and was a key ingredient to the rest of the agreement falling apart. Not being able to come back and reopen the motion necessitates a new agreement and/or trials.

After the status conference, I realized that there was a little more going on than I thought as far as procedures with the other rights involved with the global settlement. I had signed the agreement concerning 22-13584 and put it in the pile of things to be mailed. I thought that it had gone out in October 11th's mail but in fact that pile did not make it to the mailbox. I retrieved the document because I realized that it might have to be changed as well to reflect the agreement's dissolution. Only after I spoke to Michael Holliday on the 13th, did I realize the full procedural implications of what I wanted to see happen to the dissolved agreement. The agreement that was forged last year is like a line of dominos, and when one tips the rest fall as well.

During the weeks after the October 12th conference, I tried to contact the others involved. Although I placed many phone calls and sent emails to Mr. Harris, he has again refused to respond to me in any form. In fact, Mr. Harris has never returned a phone call or email to me. In fact, if he had ever done so, the entire Reid trial could have been avoided, as the settlement could have been put into place at any time. In fact, if there is anyone who has lacked diligence, and has operated outside of good faith, it is Mr. Harris. I note that he did not attend all of the hearings and status conferences either, but was not lectured by the court. It is because of his inattention that I can't verify what his clients might like to do, nor can I describe the issues I now have with his client's rights. My only recourse seems to be bringing issues up in court where he presumably will have to respond.

ARGUMENT

I must renew my objections to 22-13584 and 22-13509. The issue with 22-13509 is that the water that has been used on that property did not derive from 22-405, but is a derivative of the Withrich right. IDWR did not recommend 22-13509 in the way it is currently drawn up, and as such, without the agreement there is no reason to issue a partial decree in this case. I believe that Don Miller and I have claimed and have been using the water they now claim. The water used on lands on the north side of Paradise Springs has been used by Gary Zohner since I have been here, and before him he and his father Jacob Zohner farmed those lands with John and Chester Miller. The Millers and Zohners are related through marriage, and farmed those fields together for a long time. Chester Miller's claim was a dual claim for both the Withrich right and the Miller right, indicating that he knew he was using water from both parent rights on the lands he was irrigating. Chester Miller's pump is the basis for the claim by the successors of Fred Miller, 22-13509. I believe the water that was being pumped on to the lands claimed under right #22-13509 comes from both the Withrich and the Miller rights, not solely the Miller right. Gary Zohner farmed this property for many years before I got here and after and he told me and everyone else that he was using his water on that land. Gary Zohner has a legitimate claim to the Withrich right, but has not pursued this claim. This may be because you can't claim water on someone else's land where you've used it, meaning that he was using the Withrich water on the Fred Miller place because that was the water that had been used there since the Chester Miller pump went in and after at least 4 decades, that water is associated with the Fred Miller place by accomplished transfer. In fact, the Withrich right was part of the accomplished transfer to the Fred Miller place, not just the Miller right, and the current owners of that land deserve the water that they have used, the same as Don Miller and I do. As part of the global agreement, I was willing to set aside this issue but today, without such agreement in place, I no longer am. 22-13509 should be based on the Withrich right, not the Miller right.

The issue with 22-13584 is the actual location of the point of diversion, which differs from the POD listed. Also, the quantity probably needs to be changed to reflect pre-agreement recommendations.

I also must renew my objection to 22-11639. It, too, has a quantity that needs to revert to pre-agreement levels, namely 0.59 CFS. This is the level that was initially recommended and the amount I successfully defended at trial, and I deserve to have this right made whole. It also needs to have the priority date adjusted based on the outcome of a trial over 22-13509 or preferably, another agreement.

In addition, the rights belonging to Rex Miller, and possibly Don Miller (22-13583 and 22-13211) will need to have their quantities adjusted to reflect that there is no agreement and revert to their pre agreement recommended levels.

If the right holders of 22-13509 go after the water that has been used on their property, then it is possible that other derivatives of the Withrich right may need to be adjusted as well.

CONCLUSION

I have objected legally to the subcases above and the agreement that gave the claims teeth as currently drawn up has been dissolved. The agreement was dissolved due to a material mistake by the State in preparing the SF-5 for 22-13212, and the inability to correct this by the court deadline. There are serious material issues with all of these rights that need to be addressed prior to issuing partial decrees concerning Paradise Springs rights. While we would all like to see an end to the discussion about the Miller right and Paradise Springs, the issues that were swept under the table at the settlement conference have not disappeared and the legal representation of the right holders of rights 22-13584 and 22-13509 has not operated in good faith. I successfully argued that the above rights should not be decreed for various reasons, and it would violate my rights to simply decree them now, with no legal basis for their recommendation, and me not having had the enjoyment of inspecting them at trial. I deserve the right that I had prior to the dissolved agreement, which includes taking these cases to trial to obtain a court decision. My rights, and truth and justice supercede the interest of the court that these subcases be decided immediately.



Michael L Reid

copies to:

TS Bodge

Robert Harris

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