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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 25 2013	
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 73-12037
	)	(Sullivan)
	)	
Case No. 39576	)	SPECIAL MASTER REPORT
	)	AND RECOMMENDATION ON
	)	MOTION TO SET ASIDE
_____	)	

Findings of Fact

Earlier Proceedings

Director's Report – The Idaho Department of Water Resources filed its *Director's Report, Irrigation & Other Uses, Reporting Area 23, Basin 73*, on January 25, 2007. The Director recommended claim 73-12037 to Dawn and Robert Sullivan and Garney and Victoria Hall for 4.6 cfs from Big Creek to irrigate 84.9 acres in Custer County from April 1 to October 31 with a priority date of May 10, 1911, based on a decree. The Sullivans filed an *Objection* on December 6, 2007, objecting to quantity ("320 inches") and priority date ("5/10/1911").

SF- 5, Special Master Report and Partial Decree – On May 19, 2010, the Sullivans and Halls, with IDWR's concurrence, filed a *Standard Form 5* agreeing to 4.6 cfs to irrigate 268 acres. The Special Master entered a *Special Master Report and Recommendation* on May 25, 2010, recommending the claim as described in the *SF-5* and on June 30, 2010, SRBA Presiding Judge Eric J. Wildman entered an *Order of Partial Decree* adopting the recommendation.

Motion to Set Aside

On December 14, 2012, the Sullivans filed their *Motion to Set Aside Order for Partial Decree*. They alleged:

IDWR represented that the claimants in water rights case no.'s 73-12037 and 73-12038 [David and Natalie Laatz] would be treated similarly. The claimants in water right case no. 73-12037 did not discover that, to their detriment, they were not treated similarly until after agreeing to a stipulation with IDWR and a partial decree had been entered. Where IDWR treated similarly situated claimants disparately, equity provides that the partial decree pertaining to the party harmed by the disparate treatment should not have prospective effect and should be set aside.

Sullivans' *Memorandum in Support*, at 1.

The Sullivans provided much of the history of this subcase to help frame the issues. Base claim 73-10014, a combination of water rights 73-20, 73-21 and 73-24, was filed by M. Linden Wring in 1989, but was later split and recommended by IDWR in 2007 as 73-12037 (4.6 cfs / 84.9 acres) and 73-12038 (1.6 cfs / 36.8 acres). In 2006, IDWR told the Sullivans "IDWR could not find evidence of a conveyance of water right no. 73-00024 to the property identified as the place of use for 73-12037 and 73-12038." Sullivans' *Memorandum in Support*, at 2.

However, on August 6, 2009, the Laatzes (73-12038) were partially decreed 3.2 cfs based on a *Standard Form 5* agreement – twice the 1.6 cfs recommended earlier by IDWR. The Sullivans were told by IDWR the "additional" 1.6 cfs was awarded the Laatzes because the Laatzes were able to support an accomplished transfer from water right 73-24, but the Sullivans could not.

The Sullivans argued they should be awarded an additional 1.8 cfs from 73-24, likewise based on an accomplished transfer: "[T]here was no evidence of an accomplished transfer in subcase 73-12083 that was not also readily apparent or offered by the claimants in subcase 73-12037." Sullivans' *Memorandum in Support*, at 4.

The Sullivans cited I.R.C.P. 60(b)(5), the Equal Protection clauses of the Idaho and U.S. Constitutions and the Court's "independent authority" as the bases to set aside the *Partial Decree* for their water right 73-12037. They argued it is no longer equitable that the judgment should have prospective application.

The Sullivans concluded their arguments:

IDWR's disparate recommendations for similarly situated claimants is a unique and compelling set of circumstances and the Sullivans should have a full opportunity to support and defend their claim now that the disparity is known. Where IDWR treated similarly situated claimants disparately, equity provides that the partial decree stipulated to by the Sullivan[s] should not have prospective effect and should be set aside.

Sullivans' *Memorandum in Support*, at 8-9.

United States' Response

On February 14, 2013, the United States of America, Department of Interior, Bureau of Land Management lodged its *Response Brief in Opposition to Motion to Set Aside Partial Decree*. It joined the matter because the Sullivans alleged: "The BLM was involved in these [possible accomplished transfer] discussions because it currently holds a portion of the property to which water right no. 73-00024 was ostensibly appurtenant in the past." Sullivans' *Memorandum in Support*, at 4.¹

The United States reminded the Court back in 2010, the Sullivans agreed to the *Partial Decree* they now challenge because IDWR treated them differently than the Laatzes in subcase 73-12038. The United States argued the Sullivans presented no evidence to establish their right to more water and besides, Rule 60(b)(5) "does not apply to water right decrees and other judgments awarding property rights." United States' *Response*, at 2.

The Sullivans could not show an accomplished transfer entitling them to more water because the additional water they seek (73-24) was decreed in 1921 to land about one mile west of the place of use claimed in subcase 73-12037 and there is no record of such water being transferred or conveyed to the Sullivans' property.

The United States summarized the Sullivans' core argument:

The sole basis for the Sullivans' claim appears to be that a portion of water from 73-00024 was recommended to the claimant of water right no. 73-12038, but not to them. Such argument provides absolutely no support for a claim that they are entitled to any water decreed in 73-00024. A water right claimant in Idaho is required to demonstrate ownership of the property right on the strength of their own title, not on the strength or weakness of another's claim to title [citations omitted].

United States' *Response*, at 4.

The United States then argued Rule 60(b)(5) applies only if a judgment has prospective application. In this subcase, the Sullivans were awarded a property right and their *Partial Decree* was not a judgment having prospective application. Hence, it cannot be challenged under Rule 60(b)(5). Further, the SRBA Court has no authority to grant the Sullivans' *Motion* as an independent action for equitable relief because there was no showing of exceptional

¹ SRBA's IWATRS Reports show 73-24 as an "invalid subcase number."

circumstances such as "an extreme degree of fraud or overreaching." *United States' Response*, at 6, citing *Harper v. Harper*, 835 P.2d 1346, 1348 (Idaho App. 1992).

Hearing

A hearing on the Sullivans' *Motion* was held on February 21, 2013, at the SRBA Courthouse in Twin Falls, Idaho. Michael D. Allen appeared for the Sullivans; Garney and Victoria Hall did not appear;² David L. Negri appeared for the United States, along with Fredric W. Price; and Andrea L. Courtney appeared for IDWR, along with Carter Fritschle and Suzy Cooley-Denney.

IDWR said the record is undisputed and IDWR stands by its recommendation of water right 73-12037. There is no new evidence to suggest there was an error in its recommendation, there was no accomplished transfer and the recommendation was not arbitrary or capricious. IDWR agreed it erred when it doubled the amount of water recommended to the Laatzes (73-12038) but the Sullivans are now essentially asking IDWR to make the same mistake again with their claim – something it cannot and should not do because Basin 73 is closed to late claims.

The Sullivans said the whole matter stems from a 2003 *Warranty Deed* in which they and the Halls bought land from Robert P. Dreyer "Together with the following described water rights: 320 inches with a priority date date of 5/10/1911, No. A37-10014." *Affidavit of Michael D. Allen*, Exhibit 12, A. A civil action they filed against Mr. Dreyer in Blaine County has not produced the additional water they seek. The Sullivans mentioned the BLM did not contest the 1.6 cfs awarded to the Kraatzes, but at this point, they want 1.8 cfs more water "whatever the source."

Discussion

This subcase illustrates the dilemma faced by anyone who buys land relying on the seller's representation of appurtenant water rights. From the onset of the SRBA, a goal has been to establish IDWR as the sole repository of *accurate* and *current* water right records. If a prospective land purchaser wants to know whether the seller holds valid water rights, a key portion of the title search must include examining IDWR's records.

² In Court, Mr. Sullivan said he bought out the Halls and would soon file with IDWR a notice of change of ownership of water right 73-12037.

Here, the Sullivans and Halls apparently bought the land relying on the seller's representation that he owned 320 inches of early priority water. When that turned out not to be accurate, the sole remedy was to seek restitution in some form other than live water. The remedy does not lie with asking IDWR to recommend more water just because it mistakenly recommended additional water to a similarly situated claimant. One mistake does not warrant another mistake. And the SRBA Court lacks authority to set aside a *Partial Decree* where the Sullivans failed to establish a valid claim to more water. No additional water has been transferred to their property from another parcel and Basin 73 is closed to late claims.

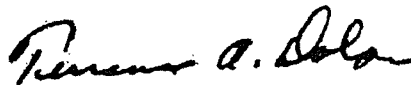
Conclusions of Law

The Sullivans have failed to show good cause to have the *Partial Decree* in subcase 73-12073 set aside and modified.

Recommendation

THEREFORE, IT IS RECOMMENDED that the Sullivans' *Motion to Set Aside Order for Partial Decree* be **denied**.

DATED March 25, 2013.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT AND RECOMMENDATION ON MOTION TO SET ASIDE was mailed on March 25, 2013, with sufficient first-class postage to the following:

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