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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF AND FOR IDAHO, IN THE COUNTY OF TWIN FALLS

In Re CSRBA

Case No. 49576

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SUBCASE NO. 92-10502

AMENDED TRIAL BRIEF

NAMES AND ADDRESSES OF PERSONS OBJECTING

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CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Darcy McInturff
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Cataldo, ID 83810

Douglas McInturff
17786 E Canary Creek Rd
Cataldo, ID 83810

Jeffrey P. Baker
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I.

INTRODUCTION

This amended trial brief makes reference to attachments previously referred to as “exhibits” and filed with the Court on June 6, 2016. Attachments to this amended trial brief are the same as previously filed “exhibits” and are intended to be submitted as evidence at trial.

This trial brief refers to SUPPLEMENTAL DIRECTOR'S REPORT, REGARDING SUBCASE NO. 92-10502, dated April 20, 2016, prepared by the Idaho Department of Water Resources, Gary Spackman, Director, Carter Fritschle, Manager, Adjudication Section. For clarity of presentation the comments will parallel the format and address the relevant issues mentioned in the Supplement Report (“706 Report”). All attachments in this trial brief are listed in section VI, page 10.

II. SUMMARY OF THE ISSUE

The 706 Report, p.1, states, "After investigation of the claim, IDWR was unable to make a determination which, or if any, of the claimants had exclusive ownership of the water right." It is the position of the Objectors, Jeffrey P. Baker and William H. Ross, that a water right was perfected, but ownership stayed with the land. The fact that the name on the Permit was other than the landowner and there was not a deed that separated the appurtenant water right from the land is at the root of the confusion and conflict concerning ownership. IDWR determined the conflict concerning ownership must be adjudicated by the court.

III. DISCUSSION

The 706 Report, p. 2, correctly states that application for Permit 92-7090 was made in the name of St. Maries Wild Rice Growers (SMWR) and that the company did not own the property on which the place of use is located. The property was owned by Albert and Ludie Best. (Attachment 1)

WHAT IS THE MEANING OF APPURTENANT?

The approved Water Right License 92-7090 stated as condition number 2, "This water right is appurtenant to the described place of use." (Attachment 2, p.1)

"Appurtenant to place of use" means "A water right that belongs to the legal owner of the land described as the place of use on the water right," according to "Water Glossary" of Ridenbaugh Press, publishers of the Snake River Basin Adjudication Digest and other publications. Ridenbaugh Press says the terms and definitions are

based on material developed by the Idaho Department of Water Resources, and other agencies. (Attachment 3) <http://www.ridenbaugh.com/srba/watglos.htm>

Condition 2 of the Water Right License is consistent with Idaho Code §42-101, which states in part:

“... and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied...”

Common understanding of this section of Idaho Code is that a water right stays with the land unless contracted away by deed or other legal conveyance.

The deed to Albert and Ludie Best’s land and the place of use includes “...all and singular the hereditaments and appurtenance thereunto belonging...” (Attachment 1, page 1)

IS A DEED REQUIRED?

Under some circumstances water rights are not necessarily appurtenant to the land. Water right ownership in Idaho is legally treated as real property and can be separated from land ownership, *but it must be conveyed by deed*. I. C. §55-101, I.C. §55-601. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151 (1952). (Attachment 16, p.1 of 3)

Regarding Water Right License 92-7090, Idaho Code says the water right is appurtenant, condition number 2 on the License says it is appurtenant, and the

landowner's deed says it includes all appurtenances. IDWR Records department does not have a deed that separates the appurtenant water right from the place of use.

The Objectors understand from talking with officials at IDWR that things are done differently now than they were done in 1981, meaning more attention is given to determining legal ownership when application is made. We understand from a recent discussion with an IDWR Regional Manager, that in those cases where the applicant for permit is other than the landowner the permit is required to be put in the name of the landowner, unless a deed severs the appurtenant water right from ownership of the place of use. The Objectors understanding is consistent with the requirement on IDWR "Notice of Change in Water Right Ownership" forms. The form requires a copy of the most recent deed, title policy, contract of sale or other legal document indicating ownership of the water right. I. C. §42-207. No record has been found indicating compliance with this requirement. A deed separating the appurtenant water right from the place of use was not submitted in 1981 with the original application. The required deed was not submitted in 2005 with the filing of the Bruner/McInturff change of ownership form. (Attachment 4) It was not submitted because such a deed does not exist.

The Objectors believe from family discussions it was certainly not the intent of the landowners, Albert and Ludie Best, to separate, sell, trade, or in any way convey a water right appurtenant to their land to SMWR, or any other party. In fact the Objectors believe the landowners did not even know SMWR had applied for the water right.

The original landowners died and the property was separated and conveyed to their heirs, the Bakers and the Rosses. Albert Best died October 9, 1991 and Ludie Best died September 2, 1995.

The current landowners, Bakers and Rosses, argue that the water right was properly perfected but ownership remained with the landowners. Ownership was never

separated from the land. The water right was conveyed without expressly mentioning the water right via the same instrument that conveyed the land to which the water right is appurtenant. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984), I.C. §42-220. (Attachment 16, p. 1 of 3)

The instrument conveying a portion of the original real property is a warranty deed made with Ludie Best as Grantor and the Rosses as Grantees. (Attachment 5)

The instrument conveying real property to the Bakers was a deed made by co-personal representatives of the Estate of Ludie M. Best, deceased, Grantors, to Jeffrey P. Baker and Mary Lou Baker, husband and wife, as Grantees. The deed includes the statement, "with all appurtenances." (Attachment 6, p. 2 of 3)

WHAT IS THE IMPORTANCE OF A WRITTEN LONG-TERM LEASE?

SMWR had a verbal agreement to grow wild rice on the owner's land and share the crop. It is the belief of the Objectors that the intent of the landowner was to be able to terminate the verbal agreement at any time and prohibit trespass. SMWR did not have a written lease much less a "long-term lease" as Al Bruner stated in the original application. (See 706 Report p.3, and Attachment 7, p. 2 of 5)

Condition number 6 states, "Issuance of this permit in no way grants a right-of-way or easement across the land of another." (Attachment 2, p. 2 of 2)

SMWR did not have a long-term lease that granted "easement across the land of another" therefore had no guarantee of access to point of diversion, place of use, or beneficial use. Without these elements there is no water right. (IDWR website: "A water right is authorization to use water in a prescribed manner, not to own the water itself. Without diversion and beneficial use, there is no water right.")

Lemmon v. Hardy says you can't get a water right on land you don't own. If the applicant doesn't have any means of acquiring the land stated in their application they cannot get a water right. Persons may not speculate by getting a water right and then seeking a place of use. "The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid." *Lemmon v. Hardy*, 519 P. 2d 1168, 95 Idaho 778 - Idaho: Supreme Court, 1974. (Attachment 16, p. 1 of 3)

SMWR was not a trespasser because the company had verbal permission to be on the property. But, verbal permission did not give guaranteed long-term access to the necessary elements of a water right; the landowner retained access to these elements therefore could be the only party exercising the rights of ownership to the water right.

DOES A NAME ON A LICENSE ALWAYS REFLECT LEGAL OWNERSHIP?

The name put on the permit can be more a convenience, or convention, than a statement of accurate legal ownership. In *Snider v. Arnold*, there was a conflict between the name on a Forest Service special use permit and the actual legal ownership of the property. The court held that even where the evidence is conflicting, it may still be substantial and competent, and it is for the district court to weigh the evidence and judge the credibility of witnesses, citing *Clayson v. Zebe*, 153 Idaho 228, 234, 280 P.3d 731, 737 (2012). (*Snider v. Arnold*, 289 P. 3d 43, 153 Idaho 641 - Idaho: Supreme Court, 2012.) (Attachment 16, p. 2-3)

The Supplemental Director's Report correctly states that IDWR approved Transfer No. 4547 and listed Jeffrey P. Baker as the owner on the approved transfer document on April 12, 1995. At the time Baker had a ten-year lease with the landowner which gave him access to the necessary elements of a water right. (Attachment 8). With the lease, Baker had more basis for water right ownership than SMWR without a lease. However, it is the position of the Objectors that even with Baker's name on the Transfer, the

ownership of the water right remained with the landowner. If the court finds to the contrary, that IDWR putting a name on a license constitutes ownership, then the McInturffs need to show deeds that complete a chain of title going back to the original appurtenance of the water right to the land. No such deeds severing the water right from the land are found in IDWR records.

DID THE 2001 SALES AGREEMENT EXCLUDE LICENSES PERTAINING TO BAKER'S FIELD?

The McInturffs claim ownership of water rights by virtue of a sales agreement between Bruner and McInturff. The sales agreement is not in the form of the required deed. Furthermore, water rights to Baker's fields are excluded from the sales agreement with this statement: "The licenses pertaining to Jeff Bakers (sic) fields were given to him earlier." (Attachment 9, p. 2 of 3).

It should be noted that SMWR was administratively dissolved 6 Feb 1998. (Attachment 10)

IV.

Remedy Sought

SMWR did not have a deed, or the other elements of a water right. Likewise, the McInturffs who claim to be successors to SMWR currently do not have a deed, diversion, beneficial use, place of use, a valid sales contract, or a lease. For them to be awarded any part of ownership in the water right appurtenant to our land would be a miscarriage of justice and contrary to the intent of Idaho Code.

The fact that the Permit was issued in the name of SMWR gave a false impression of ownership when none legally existed. This has caused conflict referred to in the 706 Report. Had the Permit been issued in the name of the landowners, years of confusion

and conflict could have been avoided. Therefore, the Baker's and the Rosses, request the court to exercise its equitable power under the legal concept of constructive trust.

The Bakers and the Rosses request the court to exercise its power of equitable construction according to legislative intent and within the spirit and general meaning of the Idaho Code. (Black's Law Dictionary, p. 386) (Attachment 16, p. 3 of 3)

Specifically, we request the court award the original Permit 92-7090, renumbered 92-10502, to the Bakers and Rosses as sole owners, split according to current place of use ownership. We request the water right be split so that ownership matches land ownership. We request that the Rosses be awarded a renumbered water right with a July 21, 1981 priority date, separate points of diversion and place of use located on their land, and with their own beneficial use. We request the same for Baker ownership—separate water right number, July 21, 1981 priority date, separate place of use, separate point of diversion, and separate beneficial use, and according to current land ownership.

V.

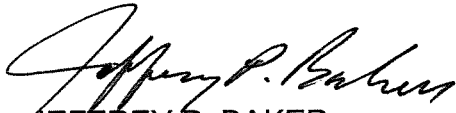
Conclusion

The McInturffs do not have the required elements of a water right. Awarding the McInturffs any portion of the water right under these circumstances would be a miscarriage of justice and contrary to legislative intent and the meaning of Idaho Code. An equitable construction by the court could prevent the injustice.

The Objectors submit this amended trial brief to the court with like force and effect of an affidavit in accordance with Idaho Code §9-1406

I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED July 8, 2016


JEFFREY P. BAKER


WILLIAM H. ROSS

VI.

Attachments

1. Deed of Albert and Ludie Best, "all...appurtenances"
2. Water Right License 92-7090
3. Water Glossary, Ridenbaugh Press,
<http://www.ridenbaugh.com/srba/watglos.htm>
4. Change of Ownership, McInturff, dated August 17, 2005.
5. Deed of William and Marie Ross, "with all...appurtenances..."
6. Deed of Jeffrey and Mary Lou Baker, "with all appurtenances."
7. Application for Permit 92-7090, approved September 24, 1981.
8. Ludie Best and Baker 10-year lease, 6/26/1994, replaced SMWR verbal lease.
9. Sale of Wild Rice Harvesting Business, Bruner to McInturff, dated July 15, 2001.
10. Idaho Secretary of State, SMWR admin dissolved, 6 Feb 1998
11. Baker sells interest in SMWR, effective 12/31/1988
12. Baker resigns as President of SMWR and member of Board, 3/1/1989
13. Baker letter to Doug McInturff, 10/23/2012, initial request for help in adjudication
14. Baker letter to Doug and Darcy McInturff, 9/4/2014, expiration of lease
15. Baker letter to Doug and Darcy, 11/27/2015, request for out of court settlement
16. Case Law Citations in Trial Brief 92-10502
17. Timeline in support of Trial Brief 92-10502

CERTIFICATE OF MAILING

I certify that on July 8, 2016 I mailed the original and copies of this Trial Brief including all attachments, to the following persons:

Original to:

Clerk of the District Court
Coeur d' Alene-Spokane River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

One copy to the claimants of the water right at the following address:

Darcy and Douglas McInturff
17786 E Canary Creek Rd.
Cataldo, ID 83810

William H. Ross
PO Box 161
St. Maries, ID 83861

Jeffrey P. Baker
715 N Chisholm Ct.
Post Falls, ID 83854

Copies to:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Signature:

A handwritten signature in black ink, reading "Jeffrey P. Baker". The signature is written in a cursive style with a large, stylized initial "J".

Jeffrey P. Baker

Appearing pro se