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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - CSRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 17 2017	
By _____	Clerk
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA

Case No. 49576

) Subcase No. 91-7094

)

) MEMORANDUM DECISION AND
) ORDER

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I.

BACKGROUND

1. On June 6, 2011, Douglas and Darcy McInturff filed a claim for the above-captioned water right in the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA"). The claim seeks the right to divert 1.4 cfs and/or 210 acre feet annually from the St. Joe River and an unnamed stream for the irrigation of 70 acres in Benewah County. The claim is based on a prior license.

2. On February 24, 2015, the Director of the Idaho Department of Water Resources ("Department") filed his *Director's Report for Basin 91 Water Rights*. The Director recommended that the water right be decreed to Douglas and Darcy McInturff.

3. Jeffrey Shippy objected to the Director's recommendation, asserting the water right should be decreed in his name as sole owner. He also filed a competing late claim to the right in subcase number 91-7893.¹

4. After examining the competing claims, the Director filed an *Amended Director's Report*. He recommended that the claim be decreed to Douglas McInturff, Darcy McInturff, and Jeffrey Shippy. The Director subsequently explained he was unable to determine to whom the

¹ The competing late claim was subsequently disallowed in favor of resolving the ownership dispute in the above-captioned subcase.

water right should be decreed and therefore recommended it be decreed in the name of all three claimants.

5. A trial on the matter was held before the Special Master on August 3, 2016. Following trial, the Special Master issued a *Report and Recommendation* finding that the McInturffs owned the water right. The Special Master therefore recommended the right be decreed to the McInturffs.

6. On November 28, 2016, Shippy filed a *Motion to Alter or Amend* requesting that the *Report and Recommendation* be amended to have the right decreed in his name. The Special Master issued an *Order* denying the *Motion to Alter or Amend* on March 23, 2017.

7. Shippy and Cedar Creek Ranch, LLC (collectively “Objectors”) then filed a *Notice of Challenge*, challenging the Special Master’s determination regarding ownership. A hearing on the *Notice of Challenge* was held before the Court on July 18, 2017.

II.

STANDARD OF REVIEW

A district court is required to adopt a special master’s findings of fact unless they are clearly erroneous. I.R.C.P. 53(j); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court “inquires whether the findings of fact are supported by substantial and competent evidence.” *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18. The special master’s conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master’s conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court’s standard of review of the special master’s conclusions of law is one of free review. *Id.*

III. ANALYSIS

This matter involves competing claims to a single water right. The McInturffs' claim is based on prior assertions of ownership and their beneficial use of the water in dispute. The Objectors' claim is based on ownership of the land on which the water right has historically been used. Following trial, the Special Master found the McInturffs to be the owners of the water right and recommended the right be decreed in their names. For the reasons set forth below, the Court adopts the Special Master's finding that the McInturffs own the water right.

A. The Objectors have not beneficially used water under the right.

The Objectors claim ownership of the water right by virtue of their ownership of the land on which it is used. It is undisputed that Cedar Creek Ranch, LLC owns the land identified as the place of use under the right. However, the Court fails to see how land ownership equates to ownership of the water right under the facts and circumstances present here. A basic tenant of Idaho water law is that water rights accrue to those who divert water and apply water to beneficial use. *See e.g., U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) ("under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho"). There is no contention that either Objector has historically beneficially used the subject water. To the contrary, the record establishes that neither Jeffrey Shippy nor Cedar Creek Ranch, LLC, has historically used water under the right.

A brief history of the right is necessary. In October 1983, St. Maries Wild Rice Growers filed an application for permit to appropriate the water now in dispute. The record indicates that St. Maries Wild Rice Growers was a partnership between Jeffrey Baker and Alexander Bruner that engaged in the commercial production of wild rice. Tr., 127 & 137. The application sought an irrigation water right to facilitate the growing and harvesting of wild rice on a place of use located in Benewah County. St. Maries Wild Rice Growers did not own the place of use where the water was to be used. That land was owned by Aaron Robinson, a predecessor to Cedar

Creek Ranch, LLC. However, St. Maries Wild Rice Growers was permitted by the landowner to use the place of use to cultivate wild rice pursuant to agreement.²

The Department approved the application for permit in November 1983, and issued a license for the right in 1991. Both permit and license were issued in the name of St. Maries Wild Rice Growers. The place of use identified in the license was cultivated by St. Maries Wild Rice Growers and/or St Maries Wild Rice, Inc. until 2001.³ During that time the water right was held by St. Maries Wild Rice Growers. On July 15, 2001, Alexander and Judith Bruner entered into an agreement to transfer and sell various business interests and wild rice harvesting equipment located in St. Maries, Idaho to Douglas McInturff. By its terms, the sale agreement included the sale and transfer of water right 91-7094. Beginning in 2001, the St. Joe River Wild Rice Company took over the cultivation of wild rice at the place of use set forth in the license. Cultivation was continued by the St. Joe River Wild Rice Company until 2014. Douglas and Darcy McInturff are the owners of the St. Joe River Wild Rice Company. On August 17, 2005, Douglas McInturff submitted notice of change of ownership of the water right to the Department pursuant to Idaho Code § 42-248. The Director transferred ownership of the water right to Douglas and Darcy McInturff on December 6, 2006.

A review of the record thus establishes that neither Objector has historically beneficially used water under the above-captioned water right. Notwithstanding, the Objectors assert a remark in the license operates to vest ownership of the water right in them. The remark on which the Objectors rely provides "This water right is appurtenant to the described place of use." At the time the license was issued for the water right, the land identified as the place of use was owned by Aaron Robinson. Robinson subsequently conveyed that land to Shippy who in turn conveyed it to Cedar Creek Ranch, LLC. The Objectors appear to argue either that the remark has operated from the time the license was issued to vest ownership in Robinson, or that it operated to divest ownership from St. Maries Wild Rice Growers and transfer it to Shippy when

² There is some disagreement between the parties as to the nature of this agreement. However, that is a non-issue. It is undisputed that wild rice was cultivated at the place of use by St. Maries Wild Rice Growers and its successors from the time the permit for the above-captioned right was issued in the early 1980s until 2014 with the permission of the landowner. Tr., 114-117.

³ St. Maries Wild Rice, Inc. was incorporated on February 13, 1984. Along with St. Maries Wild Rice Growers it engaged in the commercial wild rice business in St. Maries, Idaho. St. Maries Wild Rice, Inc. did not hold the water right at issue here at any time.

Robinson conveyed the land to Shippy. This Court disagrees and finds such arguments untenable.

Water rights are defined by elements. *City of Blackfoot v. Spackman*, 162 Idaho 302, 397, 396 P.3d 1184, 1189 (2017). The name and address of the owner is one of those defining elements. I.C. §§ 42-1411(2)(a) & 42-1412(6). It has long been held that “water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator.” *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930). Thus, Idaho law recognizes there may be a bifurcation between ownership of the land and of the water right used on the land. *Id.* Here, the defining element of ownership is clear and unambiguous. The license plainly identifies St. Maries Wild Rice Growers as the owner.⁴ St. Maries Wild Rice Growers has never owned the land identified in the license in the place of use. As a result, a bifurcation between ownership of the land and of the water right used on the land has existed from the commencement of the appropriation. The remark relied upon by the Objectors does not operate to transfer ownership of the license from St. Maries Wild Rice Growers to Robinson, thereby creating unity of ownership. Such an argument is contrary to the plain language of the license and constitutes an impermissible collateral attack on the ownership element of the license. Rather, the remark simply clarifies that *use* of the water right is tied to the described place of use.

Therefore, the Court finds that the Objectors’ ownership claim fails. Neither Objector has beneficially used water under the right. Additionally, the remark relied upon by the Objectors did not operate to transfer ownership of the license from St. Maries Wild Rice Growers to Robinson. It follows that the Special Master did not err in determining that the Objectors do not have an ownership interest in the water right.

B. The Objectors failed to timely assert their alleged ownership interest.

The record reveals that neither the Objectors nor their predecessors asserted any ownership interest in the water right until Shippy filed the competing claim in 2015. The Objectors presented evidence at trial that it was originally intended for the water right to be held

⁴ The license was issued to St. Maries Wild Rice Growers with the knowledge that the land identified as the place of use was owned by Robinson. In the application for permit, St. Maries Wild Rice Growers provided that it did not own the land it identified as the proposed place of use. The application identifies Aaron Robinson as the landowner.

by Aaron Robinson and not St. Maries Wild Rice Growers. Tr., 136-137. However, if the Objectors or their predecessors believed the license was owned by Robinson, this proceeding is not the proper time or place to raise that argument. If the Director erred in vesting ownership of the license in St. Maries Wild Rice Growers, the Objectors or their predecessors were required to timely raise the issue before the Department, exhaust their administrative remedies, and if necessary, seek judicial review. I.C. §§ 67-5271, *et seq.* They did not, and arguing for the first time in this proceeding that the license was intended to be owned by Robinson constitutes an impermissible collateral attack on the license. *Astorquia v. State of Idaho Dept. of Water Resources*, Ada County Case No. CV-WA-2012-14102, *Memorandum Decision and Order*, p.7 (May 7, 2013).

Furthermore, at no time did either the Objectors or their predecessors assert ownership via the filing of a notice of change of ownership with the Department as required by Idaho law. I.C. § 42-248. Nor did they otherwise contest the McInturffs' open use of water under the right from 2001 to 2014. Had the Objectors or their predecessors timely asserted their alleged ownership interest as required by law, the issue of ownership could have been addressed in a timely manner on a fresh record. Instead, the Objectors and their predecessors sat on their rights for over thirty years without action. During that time the pertinent record grew stale and wanting, and the delay worked to the detriment of the McInturffs who properly asserted their ownership interest as required by Idaho Code § 42-248. The McInturffs believed they acquired good title to the water right in 2001. They proceeded to invest time and money based on their reliance on that belief, cultivating the land with the subject water right until 2014. It is undisputed that the Objectors had knowledge the McInturffs were cultivating the place of use using the subject water right and yet did nothing to apprise the McInturffs of their alleged ownership interest until 2015. Tr., 114-117. The Court holds that the Objectors sat on their rights for too long. It follows that the Special Master did not err in determining that the Objectors do not have an ownership interest in the water right.

C. The McInturffs' claim.

Unlike the Objectors, the record establishes the McInturffs have diverted and beneficially used water under the subject water. The McInturffs' use began following their acquisition of the water right in 2001 under the sale agreement. Beginning that year and up until 2014 the

McInturffs cultivated the place of use identified in the license with water available under the water right. The Objectors do not dispute the McInturffs' beneficial use. Tr., 114-117. Far from it. The Objectors were complacent with the use and had a business arrangement with the McInturffs wherein Shippy was paid in the amount of "one-third of the share" of the harvest for allowing the McInturffs to cultivate the place of use. Tr., 116. Instead, the Objectors attack the sale agreement on the grounds that Alexander Bruner did not have the authority to transfer assets held by St. Maries Wild Rice Growers, including the water right, to McInturff. In essence, they ask this Court to find that the sale agreement has no legal force or effect to the extent it purports to transfer the assets of St. Maries Wild Rice Growers. The Court is disinclined to address the legal validity of a written contract executed over sixteen years ago in this proceeding.

The Court notes that neither Objector held any interest in St. Maries Wild Rice Growers and were not in a position to know what assets could or could not be transferred by the partners. The agreement governing the rights and obligations of the partners, if one existed, was neither offered nor admitted into evidence at trial. However, it is clear from the record that neither the partners nor the legal entity itself has ever contested the sale agreement, and that the time for doing so has long expired. I.C. §§ 5-201 *et seq.*⁵ In addition, none of the former partners have claimed an interest in the water right in the CSRBA. It is further clear that the McInturffs' openly took over cultivation of the place of use from St. Maries Wild Rice Growers and St. Maries Wild Rice, Inc. following the sale agreement. The McInturffs' use of the water right to cultivate the point of diversion was known to all interested parties and any action contesting the validity of the sale agreement could and should have been pursued some time ago. *Id.* The Court will not now take up the validity of the agreement at this late date under the facts and circumstances present here.

The Court next notes that the McInturffs complied with Idaho's change of ownership statute and, unlike the Objectors, properly asserted their ownership interest. That statute requires that all persons owning or claiming ownership of a water right "shall provide notice to the department of water resources of any change in ownership of any part of the water right. . . ." I.C. §§ 42-248(1) & (2). Such a notice of change of ownership must be "accompanied by evidence showing the basis for the change in ownership." I.C. § 42-248(5). The McInturffs filed

⁵ The record establishes that on a separate occasion Bruner transferred a different water right held by the partnership. Attachment H to *IDWR Supplemental Director's Report Regarding Subcase No. 91-7094* (June 17, 2016).

their notice of change of ownership with the Department along with the sale agreement in 2005. Based on that filing, the Department transferred ownership of the water right to the McInturffs.

The Special Master placed weight on the Director's administrative determination to transfer ownership to the McInturffs. This Court does as well. When the Director acts to transfer the ownership of a water right he alters one of the defining elements of that right. Such an alteration is of legal consequence. As was testified to by Department personnel, a transfer of ownership under Idaho Code § 42-248 determines who the Department recognizes as the legal owner of the water right:

Q. [Douglas McInturff] This notice of change of ownership, was it recognized by the state? . . .

A. [Chad Goodwin] Yes, it was.

Q. [Douglas McInturff] So would it be your understanding then at this point in time, December 5, 2006, that the State of Idaho Department of Water Resources would acknowledge that the ownership of Water Right 91-7094 was in the name of Douglas and Darcy McInturff?

A. [Chad Goodwin] At that time, yes.

Tr., 58-59. Who the Department recognizes as owner of a water right is of substantial legal importance. Among other things, it controls who must be given notice when the Director takes an action that may affect that water right, such as curtailment in times of shortage or transferring ownership of the right. I.C. § 42-248(3). It also acts as notice to other water users as to ownership.

The Objectors' attempt to attack the propriety of the Director's determination to transfer ownership to McInturff in 2006. The Special Master found that "CSRBA is not the forum to attack administrative actions of the Director" citing Idaho Code § 42-1401D. This Court agrees. If the Objectors were dissatisfied with the Director's determination to transfer ownership the remedies available to aggrieved persons are set forth in Title 42 and Title 67 of the Idaho Code. *See e.g.*, Idaho Code §§ 42-1701A and 67-5271, *et seq.* The Objectors have not exhausted the administrative remedies available to aggrieved persons, and may not raise the issue for the first time at this late date before the Court. *See e.g., Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006) (Under Idaho law, the pursuit of statutory remedies is a condition precedent to judicial review); *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004) (the

doctrine of exhaustion requires a case “run the full gamut of administrative proceedings before an application for judicial relief may be considered”).

While a change of ownership proceeding may not be the proper forum for resolving ownership disputes the Director nonetheless has the authority to refuse to process the change in the absence of evidence supporting the change in ownership. I.C. § 42-249(5) (requiring that a change of ownership be accompanied by evidence showing the basis for the change in ownership). The Director’s refusal to change ownership based on lack of evidence would prompt the party seeking to change ownership to either obtain the requisite evidence or have any questions over ownership resolved in an appropriate forum.

The Objectors complain they did not receive notice of the Director’s transfer of ownership of the right to the McInturffs. The Court is unaware why the Objectors believe they were entitled to notice given their long-standing failure to assert their rights. When the Director takes an action affecting a water right he is required to serve notice on those persons on record as owner. I.C. § 42-248(3). Neither the Objectors nor their predecessors received notice because they have never been on record as owner of the water right. They sat on their rights and failed to assert ownership or file a notice of change of ownership as required by Idaho law. As such, they were not entitled to notice of the Director’s transfer of ownership and their failure to receive notice was a result of their own long-standing inaction. For the foregoing reasons, it follows that the Special Master did not err in determining that the McInturffs own the water right.

IV. ORDER

Therefore, IT IS ORDERED that the Court adopts the Special Master’s recommendation that the McInturffs are the owners of the above-captioned water right.

IT IS FURTHER ORDERED that the Court adopts the Special Master’s recommendation that the above-captioned water right be decreed with the elements as set forth in the *Special Master’s Recommendation for Partial Decree* attached to the *Special Master Report and Recommendation*.

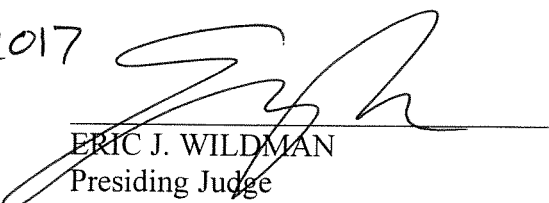
V.

ORDER GRANTING MOTION TO SUPPLEMENT RECORD

On August 2, 2017, Objectors filed a *Motion to Supplement*. The *Motion* seeks to supplement the record with a letter dated July 18, 2017, sent directly to Jeffery Shippy by Darcy McInturff, following the hearing on challenge. The letter states in substance that the McInturffs had no intention of continuing to pursue ownership of the water right and intended to allow Shippy to have the water right until such time as Shippy hired legal representation. At that point, the McInturffs decided to continue to pursue the right to “simply take delight” in the amount of attorney’s fees incurred by Shippy by continuing to litigate for ownership of the right. Douglas McInturff filed a *Response to the Motion to Supplement* explaining that Darcy McInturff was not speaking on his behalf. The McInturffs did not otherwise oppose the *Motion to Supplement*. As the *Motion* was not opposed, the *Motion to Supplement* is **granted**.

While the content of the letter does not affect the underlying merits of the case or the outcome of this Court’s decision, it does raise concern with the Court. The adjudication process is structured so as to make the process amenable to self-represented litigants. An admission that the process is being used for nothing more than to needlessly raise the cost of litigation for a party that has chosen to be represented by counsel is alarming. In Idaho, self-represented litigants are held to the same standards and rules as licensed attorneys. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 322, 297 P.3d 1134, 1139 (2013). Although Douglas McInturff states that Darcy McInturff was not speaking on his behalf, Darcy McInturff is also a claimant and party to the subcase. Since the Objectors have not moved for a sanction the Court need not address whether such conduct rises to the level of a sanctionable event.

DATED: August 17, 2017


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM
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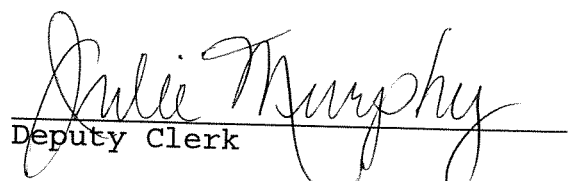
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