

RECEIVED

u A

APR 24 2007

DEPARTMENT OF
WATER RESOURCES

Albert P. Barker
John A. Rosholt
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington

BARKER
ROSHOLT
&
SIMPSON
LLP

113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

205 North 10th Street, Suite 520
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

Paul L. Arrington
pla@idahowaters.com

April 17, 2007

Cynthia Bridge Clark
Water Allocation Bureau
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098

RE: *Kelley 2007 Companion Application & Request for Expedited Review*

Dear Cynthia:

Thank you for speaking with me on the phone the other day regarding Companion Applications. I've attached the 2007 Companion Application for George Kelley.

As discussed on the phone, Mr. Kelley cannot use the water subject to this Companion Application. In 2001, the Department issued a Notice of Violation and Cease and Desist Order against Mr. Kelley. In the subsequent Consent Order & Agreement (COA) (attached to the Companion Application), the Department informed Mr. Kelley that he must, within 7-days of the agreement, weld a "steel plate ... on the casing to seal the top of the well" in section 1 (the well listed as the current point of diversion of the water rights in question).

The COA also indicated that Mr. Kelley should file a transfer application, to change the point of diversion to the section 35 well, with the Department within 60-days. While Mr. Kelley complied with this requirement, the application was returned due to errors on the application. Mr. Kelley was only recently able to file a renewed transfer application (filed March 1, 2007). As you are aware, when a transfer application is filed to change a point of diversion, the application cannot divert the water from that new point until the transfer application is approved. The current point of diversion, the section 1 well, has been capped – pursuant to the COA. Additionally, Mr. Kelley cannot divert this water from the section 35 well until his application is approved. And, as you are probably aware, there is a significant delay of the processing of transfer application. In other words, **Mr. Kelley simply cannot use the water at all**. For these reasons, Mr. Kelley respectfully requests that his application receive expedited review.

In addition, you will notice that the Application to Rent Water seeks more water (2.0 cfs) than Mr. Kelley is leasing to the bank (1.1 cfs). This is because more than 1.1 cfs is needed for

Norm Young
October 31, 2001
Page 2

his irrigation system. Currently, Mr. Kelley's Motion to File Late Notice of Claim is pending before the SRBA Court (#45-13996). This claim is seeking an addition 4.4 cfs of developed water, with a point of diversion, via accomplished transfer, from the section 35 well. In hearings on this matter, the Department's representatives have acknowledged that at least a large portion of this right should be recognized. I've attached a copy of Special Master Booth's recommendation to Judge Melanson on this matter.

Mr. Kelley has not been able to use this water for a number of irrigation seasons. Unless this Companion Application is approved, his water will sit dormant for yet another season. For these reasons, Mr. Kelley would request expedited review of the attached Companion Application

Please review the attached Companion Application and call if you have any questions.

Yours truly,

Paul L. Arrington

A handwritten signature in black ink, appearing to be 'P. L. Arrington', written over the printed name.

Encs.

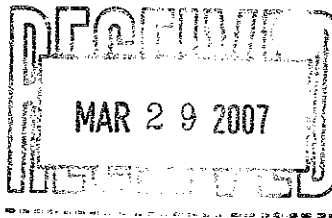
PLA/js

cc George Kelley

RECEIVED

APR 24 2007

DEPARTMENT OF
WATER RESOURCES



2007 MAR 29 AM 9:21

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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 45-13996

) (Kelley)

Case No. 39576

)

) SPECIAL MASTER REPORT

) AND RECOMMENDATION

Findings of Fact

Late Claim and Order of Reference

On March 22, 2006, George M. Kelley, P.O. Box 576, Albion, Idaho, 83311, filed a *Motion to File Late Notice of Claim* in subcase 45-13996 for 4.4 cfs from groundwater to irrigate 1,355 acres in Cassia County from March 15 to November 15 with a priority date of May 1, 1959, based on beneficial use. On August 25, 2006, Presiding Judge John M. Melanson entered an *Order of Reference to Special Master Dolan for Further Proceedings on Motion to File Late Notice of Claim* posing certain "questions to be addressed in connection with the showing of a meritorious defense."

IDWR Report

IDWR filed a *Report Regarding SRBA Late Claim No. 45-13996* on October 27, 2006, responding to the Presiding Judge's questions. Its responses follow each of the Presiding Judge's questions and are underlined:

1. Does the partial decree disallowing claim 45-11216 need to be set aside prior to proceeding on the late claim for 45-13996?
The Department does not have sufficient information before it to determine whether disallowed claim no. 45-11216 should be set aside prior to proceeding on late claim no. 45-13996.
2. Does the accomplished transfer of 4.4 cfs from the section 1 well to the section 35 well, result in an impermissible enlargement of the

original water right for purposes of applying the provisions of I.C. § 42-1425(2)?

Poor information and historical facts exist, which creates an analysis based upon speculation; resulting in an inadequate assessment of the issue at hand.

3. Has a portion of the 4.4 cfs already been decreed to water rights 45-4084 and 45-4236 [?]
Assuming that a late claim based upon an accomplished transfer is granted, no more than the combined rates for 45-4084 and 45-4236 (1.14 cfs) should be allowed.

4. For purposes of establishing an accomplished transfer to the section 35 well was there a corresponding reduction of the quantity diverted from the section 1 well?
[I]t is not known if there has been a corresponding reduction in quantity from the Section 1 well.

Kelley's Response

On December 15, 2006, Mr. Kelley filed his *Response to 706 Report*. He argued that he met the I.R.C.P. 55 (c) good cause standard to file a late claim: the default was not willful; setting aside the default would not prejudice another party (no one objected to his *Motion*); he presented a meritorious position; and he should not be required to *prove* his late claim before his *Motion* is granted.

Mr. Kelley argued that partial decree 45-11216 (an enlargement claim) does not need to be set aside prior to proceeding on his late claim 45-13996 (a claim for a new water right).

Then he argues that the late claim will not result in an impermissible enlargement: "the historical development supports a total claim of 4.4 cfs, and an accomplished change in point of diversion pursuant to I.C. § 42-1425."

Mr. Kelley pointed out that no portion of 45-13996 has been decreed, but if "the Department, upon reviewing the claim (*after* this motion has been granted), determines that less water is warranted under this right, the Department can make that decision at that point."

Finally, Mr. Kelley wrote that after the § 1 well collapsed and he was unable to divert the full 4.4 cfs, he used a smaller pump on the § 1 well and diverted water from

wells in § 7 and § 35: “With this accomplished transfer of water, Kelley correspondingly reduced the quantity of water diverted from the section 1 well.”

Hearing

A hearing on Mr. Kelley’s *Motion to File Late Notice of Claim* was held before the Special Master on February 15, 2007, at the SRBA Courthouse in Twin Falls, Idaho. Paul L. Arrington appeared for Mr. Kelley, along with Mr. Kelley’s son, Bill Kelley, and Chris M. Bromley appeared for IDWR, along with Kelly K. Christensen, Senior Water Resource Agent, IDWR Southern Region Office in Twin Falls.

Mr. Christensen and counsel for IDWR agreed with Mr. Kelley that disallowed enlargement partial decree 45-11216 (§ 7 well) does not need to be set aside and that the pending late accomplished transfer claim 45-13996 (§ 1 and § 35 wells) is for a new water right. Mr. Christensen said more investigation is required, but on its face, late claim 45-13996 is not necessarily an impermissible enlargement.

Mr. Christensen suggested that depending on missing facts, a “new” claim might remedy oversights made in Mr. Kelley’s earlier claims. For instance, 1.14 cfs has been decreed (45-4084 and 45-4236) for the § 1 well out of the 4.7 cfs originally claimed. The maximum capacity of the system seems to be 4.4 cfs depending on its actual measurement. In that case, an accomplished transfer of 3.26 cfs may be supportable, but any amount over 3.26 cfs would be an impermissible enlargement. In any event, Mr. Christensen described a confusing situation that requires more investigation. He even suggested the possibility that Mr. Kelly’s accomplished transfer should be before IDWR as an administrative action, not the SRBA, depending on the date of transfer.

Conclusions of Law

In the *Order of Reference*, the Presiding Judge acknowledged:

[N]ot allowing the claimant to file a late claim may unjustly result in the loss of the water right. However, because the claimant is relying on the accomplished transfer provisions for establishing the right the Court must ensure from the outset that the provisions of the accomplished transfer statute apply to the facts as pled.

Mr. Kelley has pled a meritorious defense and shown good cause in support of his *Motion to File Late Notice of Claim* in subcase 45-13996. The record, while confusing and incomplete in many respects, supports his late claim for an accomplished transfer of the point of diversion of a beneficial use groundwater right. Mr. Kelley claimed 4.4 cfs while IDWR suggested the quantity should be no more than 3.26 cfs. Whatever amount is supportable after further investigation by IDWR, the record is clear that Mr. Kelley is entitled to some amount of groundwater in subcase 45-13996.

The Presiding Judge has appropriately "red flagged" the claim to prevent an impermissible enlargement and has identified the key issues to be addressed before Mr. Kelley's late claim can be partially decreed. Under these circumstances, Mr. Kelley's *Motion to File Late Notice of Claim* should be granted so the evidence can be fully explored and IDWR can prepare a complete and accurate recommendation.

Recommendation

THEREFORE, IT IS RECOMMENDED that Mr. Kelley's *Motion to File Late Notice of Claim* in subcase 45-13996 be **granted**.

DATED March 29, 2007.


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 was mailed on March 29, 2007, with sufficient first-class postage to the following:

GEORGE KELLEY

Represented by:

PAUL L ARRINGTON

BARKER ROSHOLT & SIMPSON LLP

PO BOX 485

TWIN FALLS, ID 83303

Phone: 208-733-0700

DIRECTOR OF IDWR

PO BOX 83720

BOISE, ID 83720-0098


Deputy Clerk