

8-23-2017

SRBA Case No. 39576 Appellant's Reply Brief Dckt. 44944

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE SRBA, CASE NO. 39576
SUBCASE NO.: 61-12301
Partial Decree

SUPREME COURT NO. 44944-2017

RICKY C. HOLDEN and
KIMBERLY M. HOLDEN,

Objectors-Appellants,

vs.

JACKIE WEECE and TERESA WEECE

Claimants-Respondents

APPELLANT'S REPLY BRIEF

Appeal from the Snake River Basin Adjudication,
District Court of the Fifth Judicial District
of the State Of Idaho, In and For the County of Twin Falls

The Honorable Eric J. Wildman, District Judge presiding

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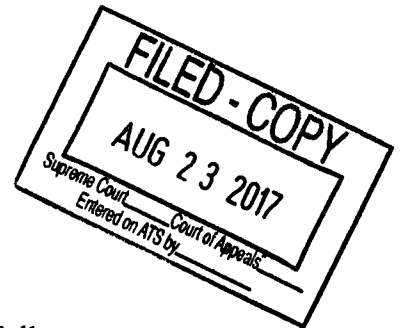


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I
STATEMENT OF THE CASE

A. DISPUTED FACTS

The Claimants-Respondents readily admit that Objectors-Respondents, (Holdens), properly amended their Standard Form 1 Objection by motion made at Trial. The motion was ultimately granted and the issue of the correct priority date for the claim was properly objected to by the Holdens. That issue is central to this case for a variety of reasons but primarily for remedies sought by the Holdens to prevent further misuse and overuse by the Weeces of the water from the common well. The priority date is determinative to whether the other water rights associated with this well are senior to the claim made by the Weeces and whether the users of those other rights will have proper recourse to the ongoing dispute that initiated the claim by the Weeces and the Objection by the Holdens.

1) THERE IS NO COMPETENT EVIDENCE TO SUPPORT PRIORITY DATE IN THE DIRECTOR'S REPORT

As stated by the Claimants-Respondents, the Director's Report was prepared by the Department's expert, Mr. Carter Fritschle, who testified that he had relied on the septic system inspection report to obtain a priority date. (TR. P. 51, L. 2-9) There was no mention within that septic system inspection report that water had been used for the testing in the year 2000. (Tr. P. 51, L. 9-25) Mr. Fritschle also admitted during trial that he had no evidence of water actually being put to beneficial use on the Weece's property for the priority date he recommended in his report. (Tr. P. 51, L2-9) He further testified that he had not conducted a site review nor looked at any other evidence. (Tr. P. 52, L- 6-17)

**2) THE PRIORITY DATE IN DIRECTOR'S REPORT WAS REFUTED BY EVIDENCE
ALREADY IN THE IDWR'S RECORDS**

The records of the IDWR already contained the application made by the Holdens for their water rights which included the sale of the subject property to their friend Loree Sanders in May of 2001. (Tr. P.52-56) Those records included the fact that the subject property was still being constructed and was not occupied until May of 2001. (*Id.*)

**3) THE PRIORITY DATE IN DIRECTOR'S REPORT WAS REFUTED BY EVIDENCE AT
TRIAL**

Mr. Holden's trial testimony directly rebutted the Director's report. The testimony showed that not only was the Report incorrect in its reliance on a septic system inspection where it lacked evidence of use of water, but also showed that the property was vacant until the time of sale to Saunders in May of 2001. (TR. *Trial November 17, 2016*, pp. 116-117, 143-145) Mr. Holden testified that the septic system inspection in 2000 was conducted by using an air test and not water. (*Id.*)

B. APPLICABLE LAW

"When one diverts unappropriated water and applies it to a beneficial use, the "right dates from the application of the water to a beneficial use." *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Idaho 63, at 82, 133 P. 655, at 661 (1913).

"That date must be based upon evidence, not speculation." *City of Pocatello v. Idaho*, 152 Idaho 830, at 841, 275 P.3d 845, at 856 (2012), citing *Reno v. Richards*, 32 Idaho 1, 8, 178 P. 81, 83 (1918).

III
ARGUMENT

A. THE SPECIAL MASTER’S REQUEST AT TRIAL FOR AN AD HOC DETERMINATION OF THE PRIORITY DATE IS REVERSIBLE ERROR.

As presented by the Respondents, the Special Master’s statement at the close of the Trial was, “It was apparently tested with perhaps air, but nonetheless, if that’s not the date, what’s the better date?” (Tr. p. 174, L. 1-3) Not only does this statement acknowledge that the priority date as recommended in the Director’s Report is erroneous, the statement invited speculation as to the correct date.

The applicable legal standard is that the date must be certain. “That date must be based upon evidence, not speculation.” *City of Pocatello v. Idaho*, 152 Idaho 830, at 841, 275 P.3d 845, at 856 (2012), citing *Reno v. Richards*, 32 Idaho 1, 8, 178 P. 81, 83 (1918).

The Special Master’s findings of fact and conclusions are therefore clearly erroneous and reversible.

1) COUNSEL FOR BOTH THE IDWR AND THE APPELLANTS RECOGNIZED THE NEED FOR THE SPECIAL MASTER TO DEVELOP ADDITIONAL EVIDENCE TO SUPPORT THE CORRECT PRIORITY DATE.

The issue of having the IDWR amend the Director’s Report regarding the recommended priority date was raised by motion at trial. The testimony and questions from counsel indicated that additional evidence was needed to identify the correct priority date and a willingness by the IDWR to develop the evidence of the correct priority date. Unfortunately, rather than allowing the Department to develop the additional evidence, the Special Master disallowed the

opportunity for such and instead invited the parties to speculate. (*Id.*, Tr. P. 171-173).

B. THIS APPEAL IS WELL-GROUNDED IN FACT AND LAW AND IS NOT FRIVOLOUS

Because the Holdens hold water rights where the common well which serves as the point of diversion for their rights and the claim of the Weeces, the issue of the correct priority date is paramount for the current dispute but any further disputes and the ability to properly adjudicate them. And because the correct priority date was not readily identifiable for the Weeces' claim, the difference between an arbitrary date of March 13, 2000 and an indeterminate date of approximately May 2001 is crucial. The incorrect date compromises the rights of the Holdens and their ability to enforce those rights. Therefore, this appeal is well-grounded in fact and law and is not frivolous.

As such, the Respondents are not entitled to attorney's fees.

**IV
CONCLUSION**

The Partial Decree for the Respondents should be reversed and the matter remanded to the SRBA Court for a determination as to the correct priority date. Appellants Holdens request and seek and should be awarded all costs and attorney's fees. Oral argument is requested.

DATED this 23rd day of August 2017.


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