1-23-2018

In re CSRBA Case No. 49576 Appellant's Brief Dckt. 45418

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 45418-2017

IN RE: CSRBA CASE NO. 49576
SUBCASE NO: 91-7094

JEFFREY C. SHIPPY

Appellant,

v.

DOUGLAS McINTURFF and DARCY McINTURFF

Respondents.

JEFFREY C. SHIPPY'S APPELLANT'S BRIEF

Appeal from the Coeur d'Alene-Spokane River Basin Adjudication,
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls;
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Procedural Rules

I. STATEMENT OF THE CASE

This appeal involves the question of ownership of a water right to grow wild rice on property now owned by Jeffrey C. Shippy's LLC (Cedar Creek Ranch, LLC). A license was issued to St. Maries Wild Rice Growers, an unincorporated association, to grow rice on the land when it was owned by Mr. Shippy's parents. A specific condition of the water right license is that the water right is appurtenant to the land owned by Mr. Shippy's parents. R. 84, *see* License Condition No. 2. The undisputed evidence at trial was that the right was intended to be appurtenant to and remain with the land. Hence, the special condition on the license. However, that license condition was not carried forward in the partial decree. R. 226.

There are two competing claimants for this water right (91-7094). They are Jeffrey C. Shippy ("Shippy") and Douglas and Darcy McInturff ("McInturff"). The Department of Water Resources ("the Department" or "IDWR") investigated the competing claims and concluded that it lacked sufficient information to determine who owned the water right, so the IDWR Director recommended that the right be decreed in the name of both McInturff and Shippy. R. 56.

McInturffs' claim to this water right was based on the license issued to St. Maries Wild Rice Growers for use on Shippy's land. They also rely on a later agreement with Mr. Al Bruner to buy his wild rice business. It is undisputed that St. Maries Wild Rice Growers never transferred the water right license to Bruner or to McInturff. On the other hand, the deeds from Shippy's parents to Shippy transferred the land with all appurtenances, including the water rights. Based on this record, the district court erred in decreeing ownership of the right to McInturff and disallowing Shippy's ownership.

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II. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in decreeing ownership of the water right to McInturff because the water right license admittedly was never transferred from St. Maries Wild Rice Growers, the original licensee, to anyone, including McInturff?

2. Whether the district court erred in decreeing ownership of the water right to McInturff based on his unilateral filing of a notice of change of ownership with the Department, when no notice of this proposed change was provided to Shippy, or anyone else, and when the notice merely results in a ministerial act by Department employees?

3. Whether the district court erred in decreeing the water right to McInturff when McInturff's claim was asserted in bad faith and for spite?

4. Whether the district court erred in decreeing water right no. 91-7094 without the express condition and requirement in the license that the water right is appurtenant to the land?

5. Whether the district court erred in failing to decree the water right to Shippy when the water right was transferred to Shippy by way of deeds as an appurtenance to the land?

III. ATTORNEYS FEES

Appellant, Jeffrey C. Shippy, requests an award of attorney's fees and costs pursuant to Idaho Code § 12-121 and Rules 38(d), 40 and 41 of the Idaho Appellate Rules. Shippy requests attorneys fees under I.A.R. 11.2 as McInturff has brought and pursued this action with a wrongful motive to harass and cause undue expense and delay. The factual basis for this harassment and wrongful motive is described in Section VI.C herein.

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IV. STANDARD OF REVIEW

> "The district court or special master shall conduct the trial without a jury on an objection or any group of objections in accordance with the Idaho rules of civil procedure." I.C. § 42-1412(5). See I.R.C.P. 53(a)(1); S.R.B.A. AO1(9)(b). The district court may appoint a special master in any general adjudication and shall specify the special master's powers and duties in the order of reference. I.C. § 42-1422. Subcases referred to a special master are governed by the I.R.C.P. and the Idaho Rules of Evidence (I.R.E.). I.C. § 42-1411(5); see S.R.B.A. AO1 9(b), (11)(d); *see also In re SRBA Case, No. 39576*, 128 Idaho 246, 258, 912 P.2d 614, 625 (1995).
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> The special master's findings which the court adopts are considered to be the findings of the court. I.R.C.P. 52(a); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct.App.1989). The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991). To the degree that the district court adopts the special master's conclusions of law, they are also the conclusions of the court. *Higley*, 124 Idaho at 534, 861 P.2d at 104.
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> The question of compliance with the rules of procedure and evidence is one of law. *See Harney v. Weatherby*, 116 Idaho 904, 906-07, 781 P.2d 241, 243-44 (Ct.App.1989). This Court freely reviews conclusions of law. *Kootenai Elec. Co-op Inc. v. Washington Water Power Co.*, 127 Idaho 432, 434, 901 P.2d 1333, 1335 (1995).

State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 740, 947 P.2d 409, 413 (1996).

V. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A. Statement of Facts.

St. Maries Wild Rice Growers was formed as an unincorporated association by Al Bruner and Jeffrey Baker. Tr. 8/3/2016, p. 127, ll. 23-24. In 1983, this association filed an Application for Permit No. 91-7094 to divert water onto property owned by Aaron and Jeanne Robinson to grow wild rice. Tr. 8/3/2016, p. 17, ll. 5-22. The Application asserted that St. Maries Wild Rice Growers held a long-term lease with the landowner. Tr. 8/3/2016, p. 17, ll. 23-p. 18, l. 1. Yet, there was no such lease. No lease was submitted with the Application or produced at trial. Tr. 8/3/2016, p. 18, ll. 2-13. The evidence at trial demonstrated that several efforts were made by St.

Maries Wild Rice Growers to induce the owners of the land (Robinsons) into signing a long-term lease. However, the Robinsons were unwilling to sign any lease. Tr. 8/3/2016, pp. 128-33. The Department's record indicates that no copy of the long-term lease is in the Department's files or was ever requested by the Department. Tr. 8/3/2016, p. 18, ll. 2-5; p. 81, ll. 18-21. Nevertheless, on November 22, 1983, the Department approved the Application and gave written notice to St. Maries Wild Rice Growers that the Application for Permit had been approved. Tr. 8/3/2016, p. 19, ll. 13-22. The approval notice was attached to the bottom of the Application; no separate permit was issued. Tr. 8/3/2016, p. 19, ll. 9-12.

Proof of beneficial use was submitted on January 10, 1984. Tr. 8/3/2016, p. 22, l. 1-7. The Department conducted its field examination in 1991. Tr. 8/3/2016, p. 39. The field examination contained no evidence that a long term lease with the Robinsons was requested or obtained. In 1991, a water right license was issued to St. Maries Wild Rice Growers for 1.4 cfs. The place of use was described as ten (10) acres in T46N, R01W, Section 7, and sixty (60) acres in T46N, R01W, Section 18. This land was owned by Robinson and now owned by Shippy. Tr. 8/3/2016, p. 11, ll. 5-9. The license contained an express condition providing that "this water right is appurtenant to the described place of use." Tr. 8/3/2016, p. 62, ll. 13-20. This condition was included in addition to the description of the place of use. Condition No. 6 of the license also provided that the license does not grant any right-of-way or easement across the land of another. R. 85.

St. Maries Wild Rice Growers obtained a separate water permit, Permit No. 92-7090, for another property in 1983. In 1984, a company by the name of St. Maries Wild Rice, Inc., was incorporated in Idaho. Tr. 8/3/2016, p. 23. Permit 92-7090 was assigned by a written assignment from the Association to St. Maries Wild Rice, Inc. Tr. 8/3/2016, p. 31, l. 25-p. 32, ll. 11; R. 74.

Critically, unlike water right 92-7090, there was no written assignment or transfer of the permit or license at issue here, water right no. 91-7094, to St. Maries Wild Rice, Inc. A few years later in 1998, St. Maries Wild Rice, Inc., was administratively dissolved. R. 159. It was never reinstated. *Id.*

Jeffrey Baker had been involved with Steve and Al Bruner in St. Maries Wild Rice Growers and later was the President of St. Maries Wild Rice, Inc. Tr. 8/3/2016, p. 127, ll. 19-p. 28, ll. 5. Mr. Baker testified that St. Maries Wild Rice Growers attempted, on several occasions, to obtain a lease agreement with Aaron Robinson for Robinson's land, but were never able to obtain one. Tr. 8/3/2016, p. 128, ll. 6-12. They had an attorney draft lease agreements and provided them to Robinson but were unable to obtain the Robinsons' signatures because "[h]e didn't want to sign a long-term lease." Tr. 8/3/2016, p. 130, ll. 23-24. Mr. Baker testified that it was clear to him that Mr. Robinson would insist on ownership of the water right on his land. Tr. 8/3/2017, p. 137, ll. 5-10. When the water right license was issued with Condition No. 2 expressly recognizing the right as appurtenant to the Robinson's land, Mr. Baker believed that the license validated his understanding – that the ownership of the water right would remain with the land and the Robinsons who owned the land. Tr. 8/3/2016, pp. 137-38.

The Special Master found that there is no record in the licensing file showing that St. Maries Wild Rice Growers became St. Maries Wild Rice, Inc., nor was there ever an assignment of permit or change of ownership from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. R. 159. The district court did not overturn that finding. Moreover, Mr. McInturff admitted there was no transfer. Tr. 7/18/17, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5. The Department has no knowledge of any relationship between St. Maries Wild Rice Growers and St. Maries Wild Rice, Inc. Tr. 8/3/2016, p. 24, ll. 7-13.

In 2001, Al Bruner ("Bruner") contracted to sell his wild rice business to McInturff. A sales agreement between Al Bruner and McInturff entitled "Wild Rice Harvesting Business Agreement" was entered into in 2001. Tr. 8/3/2016, pp. 40-42. IDWR could not determine if this Agreement served to transfer an interest in the water right. Tr. 8/3/2016, p. 41, l. 22-p. 43, l. 12. At the time of the sale of the business from Bruner to McInturff, the license for water right 91-7094 was still in the name of the Association, St. Maries Wild Rice Growers. Tr. 8/3/2016, p. 42, ll. 1-15. There is no evidence in the record that there was ever any transfer of the permit or license from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc., or to Mr. Bruner. At trial, McInturff offered no proof that either the Association, St. Maries Wild Rice Growers, or that the Company, St. Maries Wild Rice, Inc., had ever attempted to transfer ownership of the permit to Bruner. He admits there was none. Tr. 7/18/2017, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5.

Meanwhile, in 1993, Aaron and Jeanne Robinson deeded an undivided one-fourth (1/4th) interest in the real property, which is the same property as the place of use of the water right, to their son, Jeffrey Shippy. In 1994, the Robinsons deeded another one-fourth (1/4th) interest in the property to Jeffrey Shippy. In 1998, another undivided one-fourth (1/4th) interest in the property was deeded to Jeffrey Shippy. Then in 1999, the last one-fourth (1/4th) interest was deeded over to Jeffrey Shippy. In 2010, Jeffrey Shippy deeded his interests in the property to Cedar Creek Ranch, LLC, of which he is the managing member. R. 136-143. Thus, the current owner of the property to which this water right is appurtenant is Cedar Creek Ranch, LLC. Tr. 8/3/2016, p. 14, l. 12.

In 2005, McInturff submitted a Notice of Change in Water Right Ownership for water rights 92-7090 and 91-7094 to IDWR. Tr. 8/3/2016, p. 43, ll. 23-24. McInturff listed Alexander

Bruner as the former owner, not St. Maries Wild Rice Growers. R. 89. Attached to the Notice of Change of Ownership was the 2001 Agreement between Bruner and McInturff, but nothing showing that the license had been transferred to Bruner from the Association. Tr. 8/3/2016, p. 44, ll. 6-17. McInturff did not give notice to Robinsons or Shippy, or anyone else, of this Notice of Change of Ownership. After receiving the Notice of Change of Ownership, the Department sent a letter to McInturff notifying McInturff that the Department modified its records to show the change of ownership. R. 91. Idaho Code § 42-248 requires the Department to provide notice of any change of ownership to the prior owners. The Special Master correctly determined that there was no evidence that the Notice of Change of Ownership was provided to the prior owners as required by Idaho law. R. 118.

B. Course of Proceedings.

McInturff filed a claim in the CSRBA to water right 91-7094 in 2015, based upon a license issued to St. Maries Wild Rice Growers. R. 6-7. The Director's Report was filed recommending McInturff as the owner. R. 8. Shippy objected in March 2015, asserting that he should be recognized as the owner. R. 14-17. At the same time, he filed a separate late claim for a water right on his property, which was given water right no. 91-7893. R. 113. IDWR investigated the claims but was unable to determine who owned the water right. R. 56. Accordingly, in December of 2015, the Director issued an Amended Director's Report recommending both McInturff and Shippy be shown as co-owners of water right 91-7094. R. 21-24. The Director recommended that 91-7893 be disallowed on the grounds that he had recommended Shippy as co-owner of water right 91-7094. No objections were filed and the Special Master issued new recommendations listing both McInturff and Shippy as owners of 91-7094 and disallowing 91-7893. R. 25-28. McInturff then filed a letter which the court treated as a

Motion to Alter or Amend the Special Master's recommendation in 91-7094, asserting that McInturffs were the sole owners. R. 29. The Special Master granted the *Motion to Alter or Amend* and set deadlines for responding. R. 42-46. Shippy filed a timely response and objection. R. 47-49.

A trial was held before the Special Master on August 3, 2016, at which both parties appeared *pro se*. The Department was present through counsel and its witness, Chad Goodwin, an IDWR employee. Jeffrey Shippy and Douglas McInturff testified. Jeffrey Baker, formerly a member of St. Maries Wild Rice Growers when the Association applied for the permit that became water right 91-7094, also testified.

The Special Master issued a new *Report and Recommendation* on October 6, 2016. R. 110-123. The Special Master recommended that the water right be decreed in the name of McInturff and that Shippy should not be recognized either as an owner or co-owner of the water right. The Special Master stated that there was sufficient evidence in the record for the Department to infer that the water right passed from St. Maries Wild Rice, Inc., to McInturff. The Special Master concluded that it was "reasonable to assume" that the license was transferred, ultimately, from St. Maries Wild Rice Growers, an unincorporated association, to St. Maries Wild Rice Growers, Inc., to Al Bruner and ultimately to McInturff. R. 119. The Special Master determined that transfer to Bruner from St. Maries Wild Rice, Inc., was based on the corporate dissolution statute. R. 119-120. The Special Master held that Shippy's ownership of the place of use was not sufficient to recognize Shippy as an owner of the water right. R. 120.

Upon receipt of the Special Master's *Report and Recommendation*, Shippy retained counsel and filed a *Motion to Alter or Amend Special Master's Report and Recommendation*. R. 124-147. In the *Motion to Alter or Amend*, Shippy demonstrated that there were no writings

transferring the permit or license for water right 91-7094 from the Association to the Corporation or from the Corporation to Al Bruner. Shippy also demonstrated that the property he now owns was deeded to him together with all appurtenances, and that the water right license specifically made the water right appurtenant to the land he now owns. McInturff did not respond. A hearing was held before the Special Master on the *Motion to Alter or Amend* on February 1, 2017. McInturff did not appear. R. 151.

On March 23, 2017, the Special Master issued an *Order on Motion to Alter or Amend.* R. 153-166. In this *Order*, the Special Master concluded that the deeds transferring ownership of the land did not transfer the water right, even though the right was appurtenant to the land and the deeds transferred ownership of the land together with all appurtenances. R. 164-165. The Special Master concluded that there was no proof of transfer of ownership from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc., from it to Al Bruner or from Bruner to McInturff. R. 159. Even though there was no proof of transfer of ownership, because IDWR processed a change of ownership for the license from Al Bruner to McInturff, the Special Master viewed Shippy's claim to be a collateral attack on the change of ownership proceeding. Moreover, as the original *Report and Recommendation* recognized, "[t]here is no evidence that Notice of the Change of Ownership was mailed to the owner of record, St. Maries Wild Rice Growers, or St. Maries Wild Rice, Inc. In addition, there is no evidence that the Notice of Change of Ownership was mailed to Alexander Bruner." R. 118. Shippy timely filed a *Notice of Challenge* on April 6, 2017. R. 167-172. A hearing on the *Notice of Challenge* was held on July 18, 2017. R. 204.

On August 2, 2017, Shippy filed a *Motion to Supplement* the record. R. 206-207. The *Motion to Supplement* asked the court to take into consideration a letter that Shippy received from Darcy McInturff on July 23, 2017, after the hearing. That letter stated that McInturff had no

intention of keeping the water right, but intended to sit back and let Mr. Shippy spend money trying to have his interest recognized and accused him of "utter stupidity." Ex. A to *Declaration of Jeffrey C. Shippy*, Aug. p. 4. McInturff responded to the *Motion to Supplement* contending that Darcy did not speak for Douglas, that the letter was "intended to be spiteful" and asked the court to disregard the letter. R. 208-210.

The CSRBA district court issued its *Memorandum Decision and Order* and *Order of Partial Decree* on August 17, 2017. R. 214-226. The district court first held that Shippy had not beneficially used the water or the land. R. 216-218. Then the district court held that Shippy did not assert ownership of the right in a timely manner because Shippy failed to file a claim of ownership under Idaho Code § 42-248, before the CSRBA adjudication began. The court then held that it would not look into the transfer of assets to see if McInturff ever acquired title to the water right. R. 218-219. Rather, the court relied on the Department's processing of the Notice of Change of Ownership as conclusive and binding. The court further held that Shippy was required to challenge the change of ownership in an administrative forum, even though there was no publication of the notice of change and no notice of the change to anyone other than McInturff. The court then held that Shippy was not entitled to notice of the change of ownership even though Shippy was bound by the change of ownership proceeding. R. 220-222.

The district court granted the *Motion to Supplement* but concluded that Mrs. McInturff's letter did not have any effect on his rulings. R. 223.

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VI. ARGUMENT

A. McInturffs Never Acquired Title to Water Right 91-7094.

The facts on this point are clear and undisputed. The license was acquired in the name of St. Maries Wild Rice Growers. That entity never transferred the water right license to any other person or entity. A right on another property acquired at this same general time was obtained by St. Maries Wild Rice Growers and assigned in writing to St. Maries Wild Rice, Inc. R. 116. There is no evidence of any transfer of this water right. R. 115. Mr. McInturff admits that is true. Tr. 7/18/17, p. 21, ll. 13-18; p. 23, l. 24-p. 24, l. 5.

The Special Master originally concluded that it was "reasonable to assume" that Mr. Bruner acquired the license under the corporate dissolution statute. R. 119-120. Idaho Code § 30-1-1405(2)(a) specifically provides that corporate dissolution does not transfer title of the corporation's property. Even if it could, the right was never in the name of the corporation. So the corporate dissolution could not transfer something the corporation did not own.

The district court refused to even inquire into whether title had passed from St. Maries Wild Rice Growers (the licensee) to McInturff. R. 220. The law in Idaho is clear. A water right is real property. Idaho Code § 55-101(1). It must be transferred by a writing. Idaho Code § 55-601. As this Court held long ago, "a water right is real estate, any interest therein is an interest in real estate, and if Gard secured a water right under his said permits, he could not transfer it to another except by written conveyance such as would convey the title to real estate." *Gard v. Thompson*, 21 Idaho 485, 496, 123 P. 497, 502 (1912).

The Statute of Frauds provides: "No estate or interest in real property…can be created, granted, assigned, surrendered, or declared, otherwise than be operation of law, or a conveyance or other instrument in writing…" Idaho Code § 9-503. Thus, in *Joyce Livestock* this Court noted

that a separate writing, apart from the conveyance of land, would be required if there was an attempt to convey the water rights apart from the land. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007).

There are no writings transferring the water right covered by license 91-7094 from the licensee, St. Maries Wild Rice Growers, to St. Maries Wild Rice, Inc., or from St. Maries Wild Rice, Inc., to Bruner. Bruner, therefore, never had title to the water right and had no legal right to transfer the water right to McInturff.[1] Thus, McInturff cannot be decreed any interest in water right 91-7094.

B. McInturffs' Unilateral Notice of Change of Ownership did not Vest Title in McInturff.

The Special Master on Shippy's *Motion to Alter or Amend* found that there was no writing transferring title to the water right out of the ownership of St. Maries Wild Rice Growers. R. 159. The Special Master concluded that the Notice of Change of Ownership had to have been raised under the APA and could not be challenged in the CSRBA. R. 164. The district court agreed that Shippy had an obligation to challenge the Notice of Change of Ownership under the APA. R. 221. The district court acknowledged that a "change of ownership proceeding may not be the proper forum for resolving ownership disputes..." R. 222. According to the district court, if the Director had rejected the change, then question of ownership could be resolved in a "proper forum." *Id.* But here, there was no rejection by the Director that would have resulted in the decision of ownership being made in the "proper forum." Nevertheless, the district court

[1] The sale of assets by Bruner that McInturff relied on was insufficient for IDWR to determine if it attempted to transfer the water right. R. 56. But whether or not this document might qualify as a writing to transfer a water right, it does not matter because Bruner never owned the water right.

further held that Shippy was entitled to no notice of the attempted change, because he had not been listed as a prior owner. *Id.*

This ruling is the crux of the matter. How can someone obtain ownership of a water right by filing a Notice with the Department when the writings required to transfer ownership do not exist? How can the Department bind the world as to ownership of a water right when the Notice of Change of Ownership is admittedly "not the proper forum for adjudicating ownership"?

The Notice of Change of Ownership acknowledgement was signed by a technical specialist at the Department and returned to McInturff. R. 91. The Director was not involved here, and there is no evidence that any analysis was done of the title to the water right and no evidence that notice of the change was sent to anyone other than McInturff. R. 159-64. The process for notification of change of ownership stands in stark contrast to the procedures for a transfer of a water right. In 1996, the legislature intentionally set up this less formal notice process separate from the existing transfer proceedings. Idaho Sess. Law, Chap. 149, p. 487 (1996). Idaho Code § 42-248 contains no procedures for appeal from the Department's recognition of a change of ownership.

A person can use the more formal transfer process to include a change of ownership. Idaho Code § 42-248(4). So if a person wanted the legal protections offered by a transfer proceeding, they can take that route. Here, McInturff did not. In a transfer, the Director is required to publish notice and give interested parties the opportunity to protest in the same manner as a new application. Idaho Code § 42-222. There are detailed statutory guidelines for processing a transfer and special appeal provisions. There are none for a Notice of Change of Ownership. The primary benefit of Idaho Code § 42-248 is that it allows the Department to

provide notice to the claimant in future actions, including a subsequent adjudication. Idaho Code § 42-248(3).

Essentially the district court held that Shippy is bound by an action taken by McInturff under a statute that admits of no opportunity to participate and of which he had no actual notice and no constructive notice. The court reasoned that Shippy should have exhausted his administrative remedies under Idaho Code § 42-1701A and 67-5271. R. 221. Idaho Code § 42-1701A allows a person aggrieved by an action of the Director on certain actions to request a hearing. Crucially, such a request must be made within fifteen (15) days of receipt of written notice of the action of the Director. *Id.* Yet, the district court then held that Shippy was not entitled to notice of any kind. R. 222. As the Special Master found, no notice was provided. *Id.* This process of no notice, no opportunity to participate and no way to ask for a hearing cannot bind Shippy under the facts of this case. Nor did Shippy sit on his hands, as the district court held, because he was never advised of McInturffs' ownership claim. Indeed, the first time Shippy learned of McInturffs' claim to own the water right on Shippy's property was when Shippy became involved in the CSRBA process and asserted his own claim. Tr. 8/3/2016, p. 117, ll. 7-21.

"Procedural due process requires that 'there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.'" *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotations omitted); *Cowan v. Board of Commissioners*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d

1262, 1266 (1998). Idaho Code § 42-248 gave Shippy no opportunity at all to be heard under the facts of this case. He was not given any notice of any kind of the procedures.

Likewise, Shippy cannot be estopped from objecting to McInturffs' claim because Shippy did not have a "full and fair opportunity" to litigate the issue in the Notice of Change proceedings. *See Rodriguez v. Dept. of Corrections*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001). In fact, he had no prior opportunity to litigate the issue.

The CSRBA provides the opportunity to both claim a water right and to object to another's claim. Idaho Code § 42-1401A(5) and 42-1420(1). All claimants were statutorily required to assert their claim of ownership. Idaho Code § 42-1409(4) and 42-1401A(1). Objections had to be filed under Idaho Code § 42-1412(1). Shippy was unaware of McInturffs' claims to the water right on Shippy's property until the adjudication began and he learned that there were competing claims. Tr. 8/3/2016, p. 117, ll. 7-21. The CSRBA is the forum to determine the claims and objections in a manner that would provide Shippy with due process. That right is deprived if McInturffs' stealth Notice of Change proceeding binds him.

The district court erred in precluding Shippy from challenging McInturffs' claim of ownership. Ownership is the proper subject of the CSRBA. There is no question that McInturff never acquired legal title to the water right and the Notice of Change process does not deprive Shippy of his day in court, especially when there was no notice to Shippy of McInturffs' efforts.

C. McInturffs' Claim Should have been Dismissed for Pursuing this Action in Bad Faith and Out of Spite.

Following the hearing before the district court, Mrs. McInturff wrote to Mr. Shippy telling him that they had no intent to keep the water right and just wanted to ensure that he spent money on attorneys which illustrated his "mental lacuna and utter doltishness – in simpler terms,

your absolute stupidity." Ex. A to Shippy's Declaration, Aug. p. 4. Mr. McInturff responded that the letter was intended to be spiteful. R. 208.

Legal proceedings are not arenas for people to assert claims just to make their adversaries run up fees out of pure spite. This rule applies to *pro se* parties as well.

> Pro se litigants are not entitled to special consideration or leniency because they represent themselves. To the contrary, it is well-established that courts will apply the same standards and rules whether or not a party is represented by an attorney and that pro se litigants must follow the same rules, including the rules of procedure. *Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009) (citations and quotations omitted); *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005); *Twin Falls Cnty. V. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003).

Bettwiesen v. New York Irr. Dist., 154 Idaho 317, 322, 297 P.3d 1134, 1139 (2013).

Under I.R.C.P. 11(b)(1), when an attorney signs a document, it is a representation that the document is not signed for an improper purpose, including to harass or needlessly increase the cost of litigation. *See Flying A Ranch Inc. v. Board of County Commissioners for Fremont County*, 156 Idaho 449, 454, 328 P.3d 429, 434 (2014). Sanctions can be awarded to include attorneys fees or other non-monetary directives. Sanctions can be applied to the attorney or the party. *Thornton v. Davis*, 161 Idaho 301, 317, 385 P.3d 856, 872 (2016).

The district court found the McInturffs' admission "alarming." R. 223. Yet, the court seemed to believe that McInturffs' admission that they had no intent to actually pursue ownership of the right had no effect on whether the claim was properly asserted in the first place. At the least, the district court should have taken that factor into consideration in evaluating McInturffs' claim of ownership. When doing so, the court should have dismissed McInturffs' claim of ownership for misuse of the court proceedings.

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D. The District Court Erred when it Failed to Include the Conditions on the License as Conditions on the Partial Decree.

The water right license contained six conditions and, of note, a special condition requiring that "this water right is appurtenant to the described place of use." R. 84. The partial decree failed to include any of those provisions, and notably failed to include the appurtenance requirement. R. 226. Neither the district court nor the Special Master explained why the partial decree failed to include those provisions. Shippy expressly requested that they remain on the right but they were inexplicably omitted. This omission is directly inconsistent with the district court's decision here, that the license cannot be challenged, except through administrative appeals at the time of licensing. R. 155; *see Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993); *Sagewillow, Inc. v. IDWR*, 135 Idaho 24, 13 P.3d 855 (2000).

The appurtenance condition is particularly important here. It is not a condition attached to all water rights. It was added for a reason. The language cannot be ignored or excised from the right. That language advised St. Maries Wild Rice Growers and its principals, as holders of the license, that the owners of the land held an ownership interest in the water right as well. Tr. 8/3/2016, pp. 137-138; *compare United States v. Pioneer Irr. Dist.*, 144 Idaho 100, 157 P.3d 600 (2007) (equitable title in water right held by landowners). Regardless of the name of the holder of the water right on the partial decree, this important provision of the water license cannot be excluded and it was error to omit those provisions from the partial decree.

E. Title to the Water Right Vested in Shippy as a Result of Transferring the Water Right by Deed with Appurtenances.

This case has two components: Shippy's objection to McInturffs' claim and Shippy's own claim. As demonstrated in Part V.A above, McInturff does not have title to the water right as there is no writing sufficient for St. Maries Wild Rice Growers to transfer any of its interest in

the license. So this Court is left with determining whether the right should be awarded to St. Maries Wild Rice Growers, disallowed or awarded to Shippy.

St. Maries Wild Rice Growers did not file a claim to the right in the CSRBA, as required by Idaho Code § 42-1409(4). One option would be to decree the right to the Association or to allow it to file a late claim through its surviving member, Jeffrey Baker. Another would be to disallow the claim for failure to file a notice of claim.

The best option here is to recognize the intent of St. Maries Wild Rice Growers and decree the right to the landowner. The district court believed this result to be a collateral attack on the license. It is not. St. Maries Wild Rice Growers is not contesting ownership. In fact, its surviving member, Jeffrey Baker, testified that St. Maries Wild Rice Growers knew about the clause in the license that the right was appurtenant to the land and they knew that Robinson, the landowner, would never have agreed to relinquish the water right. Tr. 8/3/2016, pp. 137-138. He believed this meant the right would remain with Robinson, as the landowner. *Id.* So did Mr. Shippy. Tr. 8/3/2016, p. 117, ll. 15-16 ("I always knew that Aaron [Robinson] had water rights to that property.")

Jeffrey Shippy and Cedar Creek Ranch, LLC's ownership of the land to which the water right is appurtenant is undisputed. Tr. 8/3/2016, p. 14, ll. 7-15. In 1983, the land belonged to Aaron and Jeanne Robinson, Mr. Shippy's parents.

Through a series of gift deeds, title was passed to Mr. Shippy from his parents over time from 1993 to 1999. R. 135-143. There is no exception in the deeds excluding transfer of the appurtenant water rights. As appurtenances to the land, the Robinson's interest in the water rights passed by virtue of the deeds to Mr. Shippy from the Robinsons, as a matter of law. There is no dispute that water right 91-7094 is appurtenant to Shippy's land. There is also no dispute that

McInturff has no long-term lease, no easement, no right-of-way and no right to access the place of use for this water right.

Mr. Shippy, on the other hand, is the undisputed owner of the place of use to which the water right is appurtenant. His title was passed to him by recorded deeds. Title has since passed to Mr. Shippy's LLC, Cedar Creek Ranch, LLC. R. 145-147. The deeds did not sever the water rights. The only testimony about the intent of the Association in obtaining this water right in the first place was from Mr. Baker, a member of the Association, who was very clear that the Association's intent was to keep the water right as an appurtenance of the land. Tr. 8/3/2016, p. 137, l. 21-p. 138, l. 14.

In *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007), this Court held that the water right passes with the property to which it is appurtenant even though it is not mentioned in the deed. 144 Idaho at 13-14. "Unless they are expressly reserved in the deed or it is clearly shown that the grantor intended to reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention "appurtenances." *Id.* at 14. Thus, title to the water rights passed with the deeds to the home ranch property to subsequent buyers. *See Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010). The water right is conveyed, even though the deed does not expressly mention 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); Idaho Code § 42-220. In *Mullinix v. Killgore's Salmon River Fruit Co.*, this Court reaffirmed that "a water right is appurtenant to the land and transfers with the conveyance of the land." 158 Idaho 269, 277 (2015).

The Special Master relied on *First Security Bank of Blackfoot v. State*, 49 Idaho 740 (1930) to hold that water right 91-7094 was not appurtenant and did not transfer with the deeds.

First Security Bank involved a situation where a farmer acquired a water right on land he leased from the State. The case came to the court on a proposed transfer of the place of use. This Court noted that a water right "is not necessarily appurtenant to the land on which it was used." *Id.* at 746. That holding, while apropos to the *First Security* case, does not apply to the facts of this case. The license makes it clear that the water right is appurtenant to the Robinson's land. R. 84. Mr. Baker's testimony confirms that was the Association's intent. Tr. 8/3/2016, pp. 137-138. This right and license was initiated with the understanding of the landowners and the Association that it was an appurtenance of the real property.

Each case must be decided on its own facts. Here, St. Maries Wild Rice Growers obtained a water right on Robinson's property with the intent that the right be appurtenant to Robinson's property. It was not to be held "in gross" but specific to that property. The requirement that the water right remain appurtenant to the land passed to Shippy by virtue of the deeds. Given these unique circumstances, the best claim to water right 91-7094 rests with Shippy, particularly as St. Maries Wild Rice Growers has not asserted any claim to this right.

VII. CONCLUSION

McInturffs' claims to this water right should be disallowed. The partial decree should be amended to include all the license conditions, including the appurtenance condition, and the right should be decreed in the name of Jeffrey C. Shippy.

DATED this 23rd day of January, 2018.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Attorneys for Jeffrey C. Shippy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of January, 2018, I served true and correct copies of the foregoing **JEFFREY C. SHIPPY'S APPELLANT'S BRIEF** upon the following by the method indicated:

Original to:

Idaho Supreme Court 451 W. State Street P.O. Box 83720 Boise, ID 83720 sctbriefs@idcourts.net	____ U.S. Mail, postage prepaid __x__ Hand Delivery ____ Facsimile ____ Overnight Mail __x__ Electronic Mail or CM/ECF

Copies to:

Darcy and Douglas McInturff 17786 E. Canary Creek Rd. Cataldo, ID 83810	__x__ U.S. Mail, postage prepaid ____ Hand Delivery ____ Facsimile ____ Overnight Mail ____ Electronic Mail

Albert P. Barker