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 Case No. 39576	))))))	**Subcase: 51-10199** **ORDER VACATING PARTIAL SUMMARY JUDGMENT AND ORDER SETTING SCHEDULING CONFERENCE ON TRESPASS ISSUE**

BACKGROUND

Claim

David and Barbara Lahtinen, HC 85, Box 167A, Bruneau, Idaho 83604, filed an amended *Notice of Claim to a Water Right* on January 11, 1989, claiming .07 cfs from unnamed streams and springs "trib. to sinks" for year 'round stockwater use with a priority date of March 31, 1882, based on beneficial use. The diversion works were described as "earthen dams, catchment ponds, tanks" and the use was for "s / 205 range cattle." On the claim form, the Lahtinens said they do not own the property listed as the place of use. Under remarks, they stated: "BLM lessee." Finally, under the paragraph "other water rights used," the Lahtinens wrote: "in-stream stockwater."

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report for Domestic and Stockwater, Reporting Area 6, Volume One (IDWR Basin 51)*, on July 31, 1997. He recommended the claim as filed and listed the sources as 11 unnamed streams and springs tributary to various creeks, sinks and "O X Prong." Most relevant here, the sources included unnamed streams and springs tributary to Little Jacks Creek.

Objections

1. United States

Two *Objections* to the claim were filed on December 5, 1997. The United States of America, Department of Interior, Bureau of Land Management, objected to priority date, points of diversion and place of use. The United States *Objection* was settled on August 17, 1998, when it and the Lahtinens filed a *Stipulation to Resolve Subcase*. They agreed that the Lahtinens would dismiss the portions of their claim located on federal land. In exchange, the United States agreed that stockwater rights decreed for its competing claims "shall not be changed so long as a valid BLM-issued grazing permit exists for the land on which a particular water right is located."

2. John B. Urquidi

John B. Urquidi, J&J Ranches, filed the other *Objection*, objecting to all recommended elements except the claimed purpose of use. He also alleged, "this water right should not exist." Mr. Urquidi wrote:

> Most, if not all, of the specified or actual points of diversion [and places of use] exist on property owned by either the objecting party, other private parties, or government bodies, none of whom have authorized development of water rights for or on behalf of claimant.

Partial Summary Judgment

On December 15, 1998, then-Special Master Fritz X. Haemmerle entered his ***Order Denying, in Part, and Granting, in Part, Summary Judgment***. By then, the claimed sources were narrowed to a single spring -- Buckaroo Spring, tributary to Little Jacks Creek -- and the issues were whether the water right was perfected by trespass and whether the source is a spring constituting "private water."

Special Master Haemmerle found the following facts:

1. The source for this water is a spring. The spring is located on property owned by Urquidi.
2. Some portion of the Urquidi property is fenced. However, the portion of the Urquidi property where the spring is located is not fenced.
3. Lahtinen has watered cattle out of the spring since 1963.

4. Urquidi has not conveyed any water rights to Lahtinen, and neither has Urquidi given Lahtinen express permission to use the spring for the watering of livestock.
5. As to the area where the spring is located, Urquidi has an agreement with the Bureau of Land Management (BLM) whereby the BLM manages the land. In connection with that agreement, Urquidi acknowledges that the spring may be used by stockmen who may operate stock where the spring is located.

Special Master Haemmerle then concluded that because 1) the land where Buckaroo Spring is located is managed by the BLM and 2) the spring is left open for use by stockmen, "Urquidi has acquiesced in the use of this spring by other stockmen, including Lahtinen." Therefore, Special Master Haemmerle held, as a matter of law, the water right was not initiated by trespass.[1] However, he also held that, because there was a material issue of fact as to whether the spring constituted private water, a trial on the private water issue was necessary.[2]

J.R. Simplot Company Motion to Participate

J.R. Simplot Company filed a *Motion to Participate* on April 14, 1999, alleging that some points of diversion and places of use included in the Lahtinens' claim are located on Simplot property. However, on April 19, 1999, the Lahtinens and Simplot filed a *Stipulation and Joint Motion for Order Approving Stipulation and Deleting Points of Diversion and Places of Use in Claim No. 51-10199*. In the *Stipulation*, the Lahtinens agreed to delete from their claim points of diversion and places of use on Simplot's land.

Amended Order of Reference

On July 30, 1999, Presiding Judge Barry Wood entered an ***Amended Order of Reference Appointing Terrence A. Dolan Special Master*** in subcase 51-10199.

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[1] Special Master Haemmerle used the phrases "perfected by trespass", "perfected through trespass" and "initiated by trespass" interchangeably. Presumably, he thought they meant the same even though "perfected" suggests that a valid water right exists regardless of how the private water issue is decided.

[2] The portion of Special Master Haemmerle's ***Order Denying, in Part, and Granting, in Part, Summary Judgment*** dealing with the private water issue is entitled; "There is no material question of fact as to whether the spring constitutes private water." However, he concluded that there **is** a material issue of fact as to whether the spring constitutes private water. There is no apparent explanation for the discrepancy.

Dismissals

On November 12, 1999, the parties filed a *Stipulation of Dismissal* agreeing that Simplot and the BLM be dismissed from the subcase. On December 7, 1999, the Special Master entered an ***Order Dismissing J.R. Simplot Company and United States as Parties***.

Trial

Trial on the private water issue was held on March 24, 2000, at the Owyhee County Courthouse in Murphy, Idaho. Jay R. Friedly appeared for claimants David and Barbara Lahtinen and Paul A. Turcke and Joseph D. Mallet appeared for objector John B. Urquidi, J&J Ranches. Roxanne Brown spoke for IDWR.

Post-Trial Memoranda

The Lahtinens lodged their *Post Trial Memorandum* on April 21, 2000, and their *Reply Brief* on May 8, 2000. John B. Urquidi lodged his *Objector's Closing Argument* on April 21, 2000, and his *Objector's Final Post Trial Memorandum* on May 8, 2000.

Amended Claim

In their *Post Trial Memorandum*, the Lahtinens effectively amended their claim under 51-10199. Instead of claiming year 'round stockwater use from unnamed streams and springs, the claim was amended to an unspecified amount of water from Buckaroo Spring for 205 head of cattle from June 1 through September 30 with a priority date of April 1, 1963.

DISCUSSION

Nature of Spring Water

Before proceeding with a discussion, and for some perspective, it might be useful to consider the nature of the water source claimed by the Lahtinens and the general law of the West concerning springs:

> Spring waters are waters that break out upon the surface of the earth through natural openings in the ground. They necessarily originate from the ground-water supply. The essential difference between a spring and a well is that the former is a natural outlet for ground water, and the latter is an artificial excavation. Natural

springs, however, are sometimes "developed" by artificial means in order to increase the flow. Springs often constitute important sources of supply of surface stream systems. In other cases they may form marshes or bogs, with no natural outlet. The ground water that supplies the spring has come from some higher elevation. The discharge from the spring may sink into the ground again, or it may evaporate, or it may create a seepage area and become diffused surface water, or it may flow away in a definite surface channel that constitutes a watercourse.

Whether a landowner has the exclusive right to use a spring on his land depends, in various jurisdictions, upon whether the flow from the spring remains on his land. If the spring waters have been dedicated to the public, prior to the acquisition of a private right of use, the only way in which the landowner can acquire an exclusive right of use ordinarily is by appropriating the water, regardless of whether it remains on his land. And if the spring water flows away from his land in a defined stream which constitutes a watercourse, the law of watercourses generally applies, which means that he has no exclusive right to use the spring solely by virtue of land ownership.

The uniform holding in most high-court Western cases in which the question has been litigated is that a spring that constitutes the source of a watercourse is subject to the law of watercourses.

WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. II, at 592-593.

Statutes and Case Law

Special Master Haemmerle correctly stated that, in general, all water located in the State of Idaho is public water subject to appropriation:

> All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed.

I.C. § 42-101.

The exception is private water which, by statute, is **not** subject to appropriation:

> Diversion of private waters. -- The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its

> written permission, executed and acknowledged as required for the conveyance of real estate [emphasis added].

I.C. § 42-212.

The Idaho Supreme Court has gone so far as to hold that spring water rising on private land, not flowing off the premises and not forming any watercourse is the private property of the landowner. *Hall* v. *Taylor*, 57 Idaho 662, 67 P.2d 901 (1937).

The Idaho Supreme Court has summarized the distinction between public water (subject to appropriation) and private water (not appropriable):

> While the rule prevails that lakes of a surface area of less than five acres and pools and springs, located *wholly* upon and within the lands of a person or corporation, are appurtenant to and part of the lands and belong exclusively to the owners of the land . . . it is also well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use.

Jones v. *McIntire*, 60 Idaho 338, 352, 91 P.2d 373, 379 (1939).

In *Jones*, the Supreme Court recognized that a water right cannot be initiated in trespass upon private lands. But in that case, because water from the natural springs located on private land flowed in a natural channel upon the land of another, the water was subject to appropriation by the lower landowner for use on his own land, as against the owner of the land on which the spring rose. However, at trial, the lower landowners conceded they had no right to enter the private land without the landowner's consent to clean out the springs or ditches, the right being "limited to such waters as naturally flow from the springs to and upon [the lower landowners'] lands." *Jones*, 60 Idaho at 353, 91 P.2d at 380.

In *Maher* v. *Gentry*, 67 Idaho 559, 186 P.2d 870 (1947), the Idaho Supreme Court held that water from a spring which sank into the soil and did not flow off the premises upon which the spring rose constituted private waters. Therefore, the adjoining landowner had no right to the use of that water in the absence of strict compliance with the provisions of the statute prohibiting State officials from issuing permits to divert such waters except to the person or corporation owning the land or with his written permission. Also, see HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. II, at 608.

In *Short* v. *Praisewater*, 35 Idaho 691, 208 P. 844 (1922), the Idaho Supreme Court held that when water from a spring does not flow sufficiently to create a natural stream that runs beyond the lines of private property, that water is not appropriable without the landowner's consent. But in the *Short* case, a neighbor paid $100 for the exclusive right to use the water, plus an easement for a pipeline from the spring to his land. Hence, there was a valid appropriation as against all others.

Errors in Order Granting Summary Judgment

Special Master Haemmerle granted the Lahtinens partial summary judgment on the issue of whether the water right was initiated in trespass. As noted earlier, he held as a matter of law that the water right was not initiated in trespass because, "Urquidi has acquiesced in the use of this spring by other stockmen, including Lahtinen." In support of his holding, Special Master Haemmerle cited *Clipper Mining* v. *Eli Mining & Land Co.*, 194 U.S. 220 (1904). That case concerned a mine owner's right of present and exclusive possession of a perfected mining claim:

> [E]xclusive right of possession forbids any trespass. No one, without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface. [emphasis added by Special Master Haemmerle].

The above quote from *Clipper Mining* was, in turn, cited as authority by the Idaho Supreme Court in *Matter of General Determination of Rights*, 107 Idaho 221, 226, 687 P.2d 1348, 1353 (1984). In the latter case, the Idaho Court upheld an appropriation of .02 cfs for domestic use from an open flow of water from the Birthday Mine #24. The Court held the water was groundwater brought to the surface through excavation of the mine and therefore appropriable.[3] For approximately 29 years, a ¾-inch pipe was used to collect water from the mine tunnel stream and the owner's father routinely cleaned the screen at the pipe's inflow each spring. The Court found the mine owner "consented, or at least, acquiesced," in the diversion of water from the mine tunnel. Thus, the water right was not initiated by trespass onto another's property. That being said, the Court remanded the case for a further factual hearing on whether the appropriator established a legal or equitable right (prescriptive easement, adverse possession or "any other theory") to enter the mining claim in order to maintain their flow of water.

[3] "Ground waters are public waters" and subject to appropriation under I.C. § 42-226.

It was error for Special Master Haemmerle to rely on *Matter of General Determination of Rights* as authority to conclude that acquiescence somehow avoids a claim of trespass on the Urquidis' private property. The reason is the uniqueness of the water flowing from the Birthday Mine #24:

> The evidence offers no support for the water flow being either a lake, pond or pool; the waters here involved are running waters. The [mine owners'] argument that the mine water is a spring similarly is not persuasive. As the Oregon Supreme Court stated in *Beisell* v. *Wood*, "[a] 'spring' is a place where the water issues naturally from the surface of the earth." There was no dispute but that the water flow emanating from the mine was created as a result of the mining operation . . . . The water flow did not issue naturally from the surface of the earth; thus it was not a spring.

Matter of General Determination of Rights, 107 Idaho at 225, 687 P.2d at 1357 (citations omitted).

Because the source of water from the Birthday Mine #24 was groundwater and not a lake, pond, pool or spring, the Idaho Supreme Court held, as a matter of law, that I.C. § 42-212 did not apply. In other words, even though the source of the water was located on private land [mining claim], water from the mine was public water and could be appropriated without written permission from the landowner. That is not the situation with the Lahtinens' claim for stockwater from Buckaroo Spring on the Urquidis' land.

There seems to be no argument that 1) Buckaroo Spring is a spring, 2) it is located on private land, and 3) the Urquidis have not given the Lahtinens express (written) permission to use the spring to water livestock. Those being the facts, and assuming the water from the spring is private water ("located or situated wholly or entirely upon the lands of a person or corporation"), the factual question remains whether the Lahtinens can avoid the requirement of I.C. § 42-212 that they have the Urquidis' written permission to divert or appropriate the water of Buckaroo Spring.[4] In any event, Special Master Haemmerle's ***Order Denying, in Part, and Granting, in Part, Summary Judgment*** must be vacated. It was erroneous to conclude as a matter of law that the Lahtinens did

[4] For instance, it might be argued the Urquidis' agreement with the BLM to manage the land and the Lahtinens' grazing permit satisfy the "written permission" requirement of I.C. § 42-212. However, the following point should be considered. The Lahtinens' claim is unique in that they have claimed a stockwater right on private land where most, if not all, the places of use are on the private land. Virtually all Idaho cases reporting successful appropriations of water on private land involved diversions of the water from the private land onto the appropriators' land. Hence, the place of use of the water did not implicate a continuing trespass nor a claim of adverse possession.

not initiate a water right in trespass because "Urquidi has acquiesced in the use of this spring by other stockmen, including Lahtinen."[5]

Authority to Reconsider Prior Ruling

It might be suggested that the doctrine of "law of the case" prevents a special master from reconsidering an issue previously decided by his or her predecessor, unless the decision was clearly erroneous. By analogy, the same circumstance was addressed in *Farmer's Nat. Bank* v. *Shirey*, 126 Idaho 63, 878 P.2d 762 (1994):

> Under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure, a court may reconsider its legal rulings before a final judgment has been entered. In this case, Judge Wood reconsidered the rulings of Judge Becker before the entry of a final judgment, and, therefore, acted with authority under the rule. The doctrine of "law of the case" is inapposite to these proceedings. *Cf. Frazier v. Neilsen & Co.*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Ct.App.1990) (doctrine of "law of the case" similar to doctrine of *stare decisis* protecting against re-litigation of settled issues in different appellate stages of case).

Farmer's National Bank, 126 Idaho at 68, 878 P.2d at 767.

ORDER

THEREFORE, IT IS ORDERED that:

1. Special Master Haemmerle's ***Order Denying, in Part, and Granting, in Part, Summary Judgment***, entered December 15, 1998, is **vacated**, and

2. A scheduling conference will be held, by telephone, on **Friday, July 21, 2000, 10:00 a.m.**, concerning trial settings on the issue of trespass. Counsel for Uriquidis shall initiate a single telephone conference to the Special Master which shall include all parties and IDWR.

DATED June 23, 2000.

_____
Terrence A. Dolan
Special Master
Snake River Basin Adjudication

[5] The word "acquiesce" is defined as: "To give an implied consent to a transaction, to the accrual of a right, or to any act, by one's mere silence, or without express assent or acknowledgment." BLACK'S LAW DICTIONARY, Fifth Ed., at 22. In the context of this subcase, the word suggests that 1) there was a trespass, 2) consent was implied, not express, and 3) consent is revocable.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER VACATING PARTIAL SUMMARY JUDGMENT AND ORDER SETTING SCHEDULING CONFERENCE ON TRESPASS ISSUE as mailed on June 23, 2000, with sufficient first-class postage prepaid to the following:

Director of IDWR
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_____
Deputy Clerk