Case No. CV-94-7623

Dept. No. 1

FILED
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DISTRICT COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF PERSHING

MARIAN SAVAL FERRIGAN, Partner, The DOLORES SAVAL TRIGERO TRUST, Partner, JANE TRIGERO, Trustee of the DOLORES SAVAL TRIGERO TRUST, The JOE SAVAL COMPANY, a Nevada general partnership, and EDWARD FILBIN, Plaintiffs, v. JERRY KELLY, DEBORAH KELLY and DOES 1-10, Defendants. IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO THE WATERS OF SALT MARSH VALLEY HOT SPRING, AKA MCCOY SPRINGS AND SALT MARSH HOT SPRINGS, IN PERSHING COUNTY, NEVADA	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE**

I. FINDINGS OF FACT

(A) Proof V-04740 was filed on December 16, 1988, by Jerry and Deborah Kelly, claiming 0.1 cubic feet per second ("c.f.s.") of the waters of Salt Marsh Hot Springs, also known as McCoy Springs, with a priority of 1887. The waters claimed were for stockwatering and irrigation purposes within the SW1/4 NW1/4 of Section 33, T.26N, R.39E., M.D.B.&M. The point of diversion was described as being located within the SW1/4 NW1/4 of said Section 33. The amount of irrigation claimed was three acres within the SW1/4 NW1/4 of said Section 33.

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(B) Mr. Kelly is the successor in interest to Manuel Joseph who filed State Land Application 7997 on April 2, 1887, with the State of Nevada to purchase 560 acres of land in Humboldt County, Nevada.[1] The land patent application was filed in accord with "An Act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the State of Nevada," as approved March 12, 1885. State Land Application 7997 included various non-contiguous parcels of land, including the 40 acre subdivision of land described as the place of use under Proof V-04740. Final payment for the land patent was received on December 2, 1901. State of Nevada Patent No. 4645 under said application was issued to Manuel Joseph on December 10, 1901.

(C) In 1881, a cadastral survey of the area was performed by federal surveyors. According to notes and a map supporting that survey, the SW1/4 NW1/4 of Section 33, T.26N., R.39E., M.D.B.&M. was partially covered by meadow. Salt Marsh Hot Springs was not mentioned in the notes nor was it depicted on the map. The Court recognizes that maps made from early surveys may not be completely accurate when compared to a map made using modern standards and technology. Nonetheless, examining the present location of Salt Marsh Hot Springs and by superimposing it onto the state land plat map that depicts the meadow area for T.26N., R.39E., M.D.B.&M., and using a United States Geological Survey topographical map to interpret elevations above mean sea level, the Court finds that the spring is located down-gradient from the meadow area. The Court thus finds that the source of water for the meadow area could not have been Salt Marsh Hot Springs.

(D) Application 3756 was filed by Parker Liddell in the office of the State Engineer on December 27, 1915, and approved on November 9, 1916, to appropriate 3.2 c.f.s. from Salt Marsh Hot Springs for the irrigation of 320 acres of land. The application was later assigned to Florence McCoy. The point of diversion was described as being located within the SE1/4 NE1/4 of Section 32, T.26N., R.39E., M.D.B.&M. A "Notice of Application for Permission to Appropriate the Public Waters of the State of Nevada" was published for five consecutive weeks, beginning January

[1] At the time the land patent application was filed Humboldt County was comprised of what is now Humboldt and Pershing County.

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13, 1916, and ending on February 12, 1916, in *The Silver State* newspaper, Winnemucca and Humboldt Counties, Nevada, in accord with Section 59, Chapter 140, of the Statutes of 1913. No protests were received to this filing.

(E) Application 4373 was filed on March 24, 1917, by Florence McCoy, and later assigned to Jesusa Saval, Josephine Saval, Dolores Saval and (Juanita) Marian Saval, to change the point of diversion and place of use of 1.9385 c.f.s. from Salt Marsh Hot Springs previously appropriated under Permit 3756 for the irrigation of 193.85 acres of land. A permit was issued on July 25, 1917, totally abrogating Permit 3756, and a Certificate of Appropriation was subsequently issued on July 15, 1922. The point of diversion is described as being located within the SW portion of the SW1/4 NW1/4 Section 33, T.26N., R.39E., M.D.B.&M. The "Notice of Application for Permission to Change the Point of Diversion, and Place of Use of the Public Waters of the State of Nevada as Granted under Application and Permit Number 3756" was published for five consecutive weeks, beginning April 12, 1917, and ending on May 12, 1917, in *The Silver State*, a newspaper in Winnemucca and Humboldt Counties, Nevada, in accord with Section 59, Chapter 140, of the Statutes of 1913. No protests were received to this filing.

(F) The aforementioned notices provided constructive notice to Mr. Kelly's predecessors-in- interest during the appropriative process resulting in the State Engineer's granting of Permit 3756 and Permit 4373.

(G) A civil suit ensued between the parties in this matter over questions of ownership of the waters of Salt Marsh Hot Springs.

(H) As a result of that civil suit, on December 30, 1994, this Court ordered the State Engineer to make a final disposition of Proof V-04740 in accordance with the adjudicatory process outlined under Nevada Revised Statutes Chapter 533. As previously indicated, Proof V-04740 was previously filed to allege appropriation, in 1887, of the waters of Salt Marsh Hot Springs.

(I) In accord with the aforementioned Order and with NRS 533.090(2), the State Engineer entered Order No. 1110, on January 27, 1995, initiating proceedings for the determination of the relative rights in and to the waters of Salt Marsh Hot Springs.

(J) Notice of State Engineer Order No. 1110 was published on March 9, 16, 23 and 30

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and on April 6, 1995 in the *Lovelock Review Miner*, a newspaper of general circulation within Pershing County, Nevada.

(K) On May 11, 1995, the State Engineer issued Order No. 1114 establishing June 1, 1995 as the date the State Engineer would commence taking proofs as to the rights in and to the waters of Salt Marsh Hot Springs. Order No. 1114 established June 1, 1996 as the final date for filing said proofs in the Office of the State Engineer.

(L) Notice of State Engineer Order No. 1114 was published on May 18 and 25 and on June 1, 8 and 15, 1995 in the *Lovelock Review Miner*, a newspaper of general circulation within Pershing County, Nevada.

(M) The Joe Saval Company and Jerry Kelly were the only parties determined to have any interest in the waters of Salt Marsh Hot Springs. In accord with the provisions of NRS 533.215, both parties waived the provisions of NRS Chapter 533 with reference to notices, service and publication.

(N) Pursuant to NRS 533.140, on February 7, 1997, the State Engineer issued the Abstract of Claims and the Preliminary Order of Determination, and the Notice of Order Fixing and Setting Time and Place of Inspection in the matter of the subject adjudication. A copy of these documents was sent to each claimant on February 7, 1997. As provided in NRS 533.140, the period of time for inspection of documents was established as extending from February 18, 1997 through March 19, 1997.

(O) An objection to the Preliminary Order of Determination was timely filed by Raymond Jerry Kelly in accord with the provisions of NRS 533.145. The objection stated that:

(1) The State Engineer's conclusions that the waters of Salt Marsh Hot Springs did not flow before 1915 warrants further consideration.

(2) The Preliminary Order of Determination failed to consider the facts and decisions were based upon hearsay.

(3) The evidence found in Seismological Bulletin Volume V does not support a determination that the spring was created as a result of an October 2, 1915 earthquake.

(4) Affidavits relied upon by the State Engineer do not support the determination that the Salt Marsh Hot Springs was created by the 1915 earthquake.

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(5) Memories of hearsay should not be considered as fact.

(6) The State Engineer should not dismiss facts provided by survey notes and surveyed water maps.

(7) Mr. Kelly's objection states that his claim is valid and should be recognized for many reasons, including that:

(a) The adjudication and appropriation statutes, specifically, NRS 533.040, provides that for beneficial use purposes the water right remains appurtenant to the place of use.

(b) Joe Saval Co.'s water right has a priority date of 1920 which is junior to Mr. Kelly's water right.

(c) That the Joe Saval Co. has continued to abuse the property rights of Mr. Kelly by extending its dredging of Mr. Kelly's land for more water.

(8) The State Engineer should not allow the Joe Saval Co. to abuse a wetland and Mr. Kelly's property rights by the recognition of a certificated water right in Joe Saval Co.'s name.

(P) Following notice, a public administrative hearing on the objection to the Preliminary Order of Determination was held before the State Engineer on August 12, 1997.

(Q) After consideration of all the evidence and testimony received at the hearing on the objection to the Preliminary Order of Determination, the State Engineer issued his Order of Determination on January 7, 1999.

(R) On January 14, 1999, a certified copy of the State Engineer's Order of Determination was filed with this court in the above-entitled matter, along with the original evidence taken before the State Engineer during the administrative phase of this proceeding.

(S) On February 25, 1999, the Court issued its Order Setting Time for Hearing and further ordered that all parties aggrieved or dissatisfied with the State Engineer's Order of Determination file a notice of exceptions to the State Engineer's Order of Determination by June 11, 1999. The hearing was set to commence on Wednesday, June 23, 1999 at 9:00 a.m.

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(T) On June 14, 1999, Jerry Kelly filed exceptions to the State Engineer's Order of Determination.

(U) On or about June 17, 1999, the Saval interests filed a request that late filed objections to the State Engineer's Order of Determination be stricken.

(V) The matter was heard before the Honorable Richard Wagner on Wednesday, June 23, 1999, Judge Wagner concluding that due to Kelly's late-filed exception, the Court was without jurisdiction to hear the matter.

(W) Following the hearing before this Court, the parties entered into a Stipulation and Order settling matters in dispute between them.

II. CONCLUSIONS OF LAW

From the record on file in this case, from the argument heard by the Court and from the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

(A) The State Engineer had the right, authority and jurisdiction under chapter 533 of the Nevada Revised Statutes to make the investigations made by him, receive the proofs and maps, enter and file in his office the Order of Determination, and to file a certified copy of the Order of Determination in this Court, and to determine the relative rights of the claimant in and to the waters of Salt Marsh Hot Springs; that the State Engineer duly made all orders necessary and proper in connection therewith and entered the same in his office as required by chapter 533 of the Nevada Revised Statutes.

(B) Each and every notice required by law to be given herein to the claimants and appropriators was duly served by the State Engineer in the manner and within the time required by statute and that the notices contained all the information required by law and that the claimants and appropriators of the waters of Salt Marsh Hot Springs duly received the information and notices as required by law.

(C) The State Engineer properly concluded that no claim of vested right could be established to the waters of Salt Marsh Hot Springs due to its non-existence before October 2, 1915.

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(D) Kelly's late filed exception deprives this Court of jurisdiction to hear that exception under principles established by the Nevada Supreme Court in *G. & M. Properties v. Second Judicial District Court*, 95 Nev. 301, 594 P.2d 714 (1979).

(E) Appropriative water rights to Salt Marsh Hot Springs exist as reflected in the records of the Office of the State Engineer.

III. DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the relative rights of the users in and to the waters of Salt Marsh Hot Springs be, and the same hereby are determined as stated above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and every water user and claimant to the waters of Salt Marsh Hot Springs and each of their agents, attorneys, servants and employees and their successors-in-interest and every person or persons acting in aid or assistance of the said parties and that each of them is hereby perpetually enjoined and restrained as follows:

(A) from at any time diverting or using any of the water of Salt Marsh Hot Springs except to the extent, in the amount and in the manner and at the time or times set by this Decree or as allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada;

(B) from using any of the said water for any purpose in excess of the specific amounts set by this Decree or as allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada;

(C) from using any of the said water in any other manner or for any other purpose or purposes or upon any other land or lands than as specified and provided in this Decree or as allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada; and,

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(D) from using any of the said water at any other time or times than as specified and provided in this Decree or as allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT this Court hereby expressly reserves jurisdiction over all matters the subject of this action.

Dated this 23rd day of August, 1999.

Richard A. Wagner
DISTRICT JUDGE

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