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Department of Water Resources
Adjudication Bureau

DISTRICT COURT - SRBA
OFFICE OF THE ATTORNEY GENERAL
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	)	Subcases: 36-00046, 36-11060 and
	)	36-15462
Case No. 39576	)	
	)	AMENDED ORDER GRANTING
	)	SUMMARY JUDGMENT IN PART
	)	
	)	

I. PROCEDURAL BACKGROUND

Water rights 36-00046, 36-11060 and 36-15462 were recommended in the *Director's Report for Reporting Area 3 (Basin 36) (Director's Report)* to claimant Billingsley Creek Ranch. *Objections* to all three water rights were filed by John W. Jones, Jr. In addition, Billingsley Creek Ranch filed *Objections* to water rights 36-15462 and 36-11060. The United States filed an *Objection* to water right 36-00046. Subsequently, the United States' *Objection* was dismissed and the United States was dismissed as a party. Billingsley Creek Ranch and Mr. Jones remained as parties and settled on the elements of these water rights as set forth in the *Standard Forms 5*. The Idaho Department of Water Resources (IDWR) declined to sign the *Standard Forms 5*, disagreeing with certain elements settled by the parties.

To resolve these subcases, a *Stipulation* and *Motion for Summary Judgment* were filed July 1, 1996 by Billingsley Creek Ranch.¹ The parties agreed to a total quantity of 3.5 cfs from April 1 through September 30 and a total quantity of 4.0 cfs from October 1 through March 31

¹ The text of the *Motion for Summary Judgment* stated the motion was filed by Donnie McFadden; however, the identification of representation on the motion lists Billingsley Creek Ranch as the moving party. Billingsley Creek Ranch is a party to these subcases, and the court presumes this motion was brought by Billingsley Creek Ranch, not Mr. McFadden individually.

for all three water rights. The *Stipulation* does not indicate how the quantity is to be allocated among the three water rights. Billingsley Creek Ranch seeks a determination that there are no genuine issues of material fact as to Billingsley Creek Ranch's right to divert 3.5 cfs from April 1 through September 30 and its right to divert 4.0 cfs from Three Springs during the nonirrigation season.

II. STANDARD OF REVIEW

A. GENERAL STANDARD FOR SUMMARY JUDGMENT

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . ." to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence.

The opposing party's case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation*, 119 Idaho at 517. The burden of proving the absence of material fact rests upon the moving party. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence and drawing of legitimate inferences from the facts are functions to be performed at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. CASES WITHOUT A NONMOVING PARTY

This summary judgment motion is unique in that it does not involve opposing parties. These subcases involve two parties: the claimant Billingsley Creek Ranch and the objector John W. Jones, Jr. Both parties have stipulated that the claimants are entitled to a total of 4.0 cfs during the nonirrigation season. There is no party opposing the *Motion*. The only dispute is

between the *Director's Report* recommendation and the position advocated by Billingsley Creek Ranch and John W. Jones, Jr. IDWR is not a party. I.C. § 42-1401B(3) (1994); *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614, 624-625 (1995). Nevertheless, this court is charged with determining water rights where each party to the subcase has reached an agreement and the only disagreement is between the *Director's Report* and the parties.

In most summary judgments, the court construes the facts in favor of the nonmoving party. Here, there is no nonmoving party. Therefore, the summary judgment standard shall be applied to the *Director's Report* recommendation rather than to evidence presented by an opposing party. The statute provides that the *Director's Report* "shall constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4) (1994). The term "*prima facie* evidence" is an alternative label for a rebuttable presumption. *State v. Hebner*, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985). Thus, giving evidence "*prima facie*" status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary.

Prima facie proof does not shift the burden of persuasion on an issue, however. *Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956); D. CRAIG LEWIS, *Idaho Trial Handbook* §§ 1.4-12.7 (1995). Where a statute sets forth the weight of a presumption or its effect on the burden of persuasion, the statute controls. *Idaho County Nursing Home v. Idaho Dep't of Health and Welfare*, 120 Idaho 933, 821 P.2d 988 (1991). Idaho Rule of Evidence 301 prescribes that unless provided by statute or evidentiary rule, a presumption does not shift the burden of persuasion. Idaho Rule of Evidence 301 establishes a "bursting bubble" theory of presumptions. The rule provides that once a presumption is rebutted, it ceases to have any further effect. *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986); *But see, In re Estate of Ashe*, 114 Idaho 70, 753 P.2d 1172 (1986).

C. EFFECT OF PRESUMPTION ON SUMMARY JUDGMENT

In the context of a summary judgment motion, presumptions can operate for either a moving or opposing party. For example, in *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990), the Supreme Court upheld a summary judgment order where the nonmoving party failed to rebut the presumption of a product's useful safe life. In *Olsen*, I.C. § 6-1403 established a rebuttable presumption that the "useful safe life" of a product was ten years. The Court held

plaintiff failed to rebut the presumption with opposing affidavits. "[T]he record is completely devoid of any evidence to rebut the statutory presumption that the product's useful safe life had expired." 117 Idaho at 714. Thus, summary judgment was proper for defendants. Similarly, in *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994), the Idaho Court of Appeals found summary judgment could not be granted in a case involving the common law presumption that services rendered between those living in a family relationship are presumed rendered as gratuitous favors. The Court of Appeals held there were genuine issues of material fact where the presumption was supported by affidavits alleging a family relationship existed and countered with affidavits that no family relationship existed. 126 Idaho at 298. This court is unable to find an Idaho case in which a presumption was rebutted, yet the presumption was not supported by any affidavits.

A decision from our sister state of Montana is instructive. In *Magone v. Aul*, 269 Mont. 281, 887 P.2d 1235 (1995), the Montana Supreme Court analyzed that state's statutory presumption of forfeiture of property under the drug forfeiture laws. The Montana statute provides for a rebuttable presumption of forfeiture. In *Magone*, the defendant submitted affidavits showing a legitimate source of the seized cash. He argued that once he rebutted the presumption with affidavits, the party opposing summary judgment was required to present evidence sufficient to create a genuine issue of material fact. The Montana Supreme Court agreed that defendant's affidavits operated to rebut the presumption. The State was then required to set forth specific facts to refute the affidavits to avoid a summary judgment ruling against it.

The rule in Idaho should be the same. In summary judgment motions, the *Director's Report* conveys a presumption for each element of the water right. Once affidavits are presented which rebut the presumption, the presumption ceases to exist. Some may argue that the *Director's Report* is a presumption which operates at all times as evidence, thus preventing summary judgment even in the face of opposing affidavits. See, *Second Amended Order on Summary Judgment* (Subcases 36-0003A *et al.*) (Sept. 13, 1996). The *Second Amended Order on Summary Judgment (Second Amended Order)* held:

The claimants' assertion [that the *Director's Report* is not the type of evidence which gives rise to a genuine issue of material fact] is erroneous because, if true, then every claimant in a one-party subcase would automatically prevail on summary judgment. One-party subcases would be reduced to self-serving proceedings. Consequently, in one-party subcases, "the summary judgment

standard shall be applied to the Director's Report recommendation rather than to evidence presented by an opposing party." *In Re SRBA*, Subcase 34-02395, *Order Granting Summary Judgment* (April 30, 1996).

Second Amended Order at 3.

This court views the standard of review in summary judgment proceedings differently than the Special Master did in the *Second Amended Order*. Summary judgment standards apply to the *Director's Reports*. So long as the presumption remains unrebutted, it retains its evidentiary effect. *Director's Reports*, however, cannot prevent a summary judgment ruling where opposing affidavits rebut the presumption. Presumptions are not evidence. Presumptions merely operate to relieve those in whose favor the presumption works from having to give further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). Thus, a presumption essentially relieves a party in whose favor it operates from the burden of going forward with evidence. Once the presumption afforded the *Director's Report* has been rebutted by affidavit, specific facts must be set forth to refute the affidavits to create a genuine issue of material fact.² To hold otherwise would require every water user who disagrees with the *Director's Report* to go to trial.

III. ANALYSIS

A. QUANTITY OF WATER

The *Director's Report* recommends a quantity of 2.04 cfs for water right 36-11060, 5.7 cfs for water right 36-00046, and 2.04 cfs for water right 36-15462. In addition, the *Director's Report* contains language limiting the total amount of water used for 36-11060 and 36-15462 during the nonirrigation season: "[u]se of this right [36-15462] with right No. 36-11060 is limited to a combined diversion rate of 2.04 cfs." Billingsley Creek Ranch asserts it has a right to a total of 4.0 cfs during the nonirrigation season.

² The court declines to decide here whether the non-party, IDWR, may submit opposing affidavits in summary judgment motions or if opposing affidavits may be only submitted by parties.

Billingsley Creek Ranch brought this summary judgment motion to establish that no genuine issues of material fact remain as to whether the ranch is entitled to 4.0 cfs during the nonirrigation season.

The *Director's Report* is challenged by the *Affidavit of George H. Lemmon* and the *Affidavit of Donnie McFadden*. Those affidavits established the following uncontroverted facts:

1. Water from Three Springs has been diverted and used on property owned by Billingsley Creek Ranch on a year-round basis for at least 40 years. (*Affidavit of George H. Lemmon* at 1.)
2. The water diverted and used during the nonirrigation season was used as stock water for sheep and cattle prior to 1971. (*Affidavit of George H. Lemmon* at 1; *Affidavit of Donnie McFadden* at 2.)
3. The water diverted and used during the nonirrigation season has been used for fish propagation, aesthetics, and water fowl habitat since 1971. (*Affidavit of Donnie McFadden* at 2.)
4. Prior to 1971, Billingsley Creek Ranch's predecessors in interest diverted approximately 200 miner's inches, or 4.0 cfs, of water during the nonirrigation season. (*Affidavit of George H. Lemmon* at 2.)
5. Since 1971, at least 4.0 cfs of water has been diverted and used year-round, including during the nonirrigation season. (*Affidavit of Donnie McFadden* at 2.)
6. The three water rights in question were included in a prior decree, the *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*New International Mortgage Decree*). (The parties stipulated to the inclusions of the *New International Mortgage Decree* in the record on summary judgment.)
7. Water rights listed in the *New International Mortgage Decree* for defendants such as Billingsley Creek Ranch's predecessor Eugene and Marvel Farmer contained the following language regarding purpose of use:

It is hereby ordered, adjudged, and decreed that the defendants, counter claimants, cross-complainants, and interveners hereinafter named do have the use of, and the right to use, for irrigation, domestic, power and other purposes on the lands set after their respective names, from the streams and other sources hereinafter named, the amounts of water and priorities set after their respective names, to wit:

New International Mortgage Decree unpaginated document at the sixth page.

No affidavits were submitted on summary judgment to counter the *Affidavits of George H. Lemmon and Donnie McFadden*. IDWR lodged a *Report Regarding Quantification of Stockwater Uses (Quantification Report)*. The *Quantification Report* incorporates the guidelines used by IDWR for the quantification of water for stock water uses. The report gives an explanation as to how the standard quantification for sheep is calculated but does not relate the report to the uses claimed for fish propagation or recreation. Critically, the report is not an affidavit and thus, does not comply with the requirements of I.R.C.P. 56.

Applying the summary judgment standard, the presumption afforded the *Director's Report* ceases to exist once rebutted by substantial evidence. Here, the presumption that these water rights are entitled to only 2.04 cfs during the nonirrigation season is rebutted by substantial evidence. No genuine issues of material fact remain as to whether claimants are entitled to a total quantity of 4.0 cfs during the nonirrigation season.

B. PRIORITY

The predecessors in interest to Billingsley Creek Ranch were decreed rights in the 1932 decree of *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*New International Mortgage Decree*). That decree provided the rights decreed were not solely for irrigation purposes, but also for "domestic and other purposes."

The *Motion for Summary Judgment* and *Brief in Support of Motion for Summary Judgment* did not address the priority element. At oral argument, however, Billingsley Creek Ranch asked the court to rule there are no genuine issues of material fact that the priority date is February, 1896 for all three rights. Reviewing the pleadings and affidavits on file in these three subcases, the court finds the following facts are uncontested:

1. **Water rights 36-15462 and 36-11060** were adjudicated in the *New International Mortgage Decree* each with a priority date of February 17, 1896. (*New International Mortgage Decree*, unpaginated document at twelfth page listing predecessors J. Eugene and Marvel Farmer.)
2. **Water rights 36-15462 and 36-11060** were adjudicated in the *New International Mortgage Decree* which provided these rights were for irrigation and "domestic and other purposes." (*New International Mortgage Decree*, unpaginated document at the sixth page.)
3. **Water right 36-15462** was first used for fish propagation in 1971. (*Affidavit of Donnie McFadden* at 2.)

4. Water right 36-11060 was first used for recreation purposes in 1971. (*Affidavit of Donnie McFadden at 2.*)

Billingsley Creek Ranch argued at hearing that the "other purposes" language in the *New International Mortgage Decree* allows the parties here to change the purpose of use for their water rights without affecting the priority dates. In addition, Billingsley Creek Ranch argued that the change in purpose of use occurred prior to the enactment of statutes regulating such changes in the purpose of use.

There appears to be no genuine issues of material fact regarding the priority dates of these two water rights since all the facts are uncontroverted. However, the court requests briefing as to the *res judicata* effect of the "other purposes" language and the effect of the statutory requirements for change in purpose of use for a water right. The court declines to decide the priority date elements for 36-15462 and 36-11060 at the present time.

Water right 36-00046: The *Director's Report* recommended this water right with a priority date of February 17, 1896 and it appears the priority date of February 17, 1896 is undisputed. There are no genuine issues of material fact as to whether the priority date is February 17, 1896.

IV. CONCLUSION

In summary, the court finds there are no genuine issues of material fact as to the following elements which have been established under the standards for summary judgment.

1. For subcases 36-15462, 36-11060 and 36-00046 there is no genuine issue of material fact that the total quantity of water during the nonirrigation season is 4.0 cfs.
2. There is no genuine issue of material fact that the priority date for water right 36-00046 is February 17, 1896.

DATED February 19, 1997.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

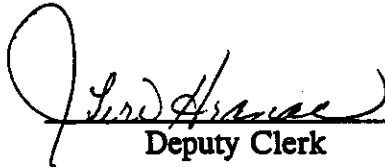
CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER GRANTING SUMMARY JUDGMENT IN PART; REQUEST FOR ADDITIONAL BRIEFING** was mailed on February 19, 1997, with sufficient first-class postage prepaid to the following:

Director of IDWR
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Deputy Clerk