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Department of Water Resources

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DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED *DL*

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: 55-10288, 55-10289, 55-10290,
	)	55-10292, 55-10293, 55-10295, 55-10296, 55-
Case No. 39576	)	10297, 55-10298, 55-10299, 55-10300, 55-
	)	10301, 55-10303, 55-13451
	)	
	)	ORDER GRANTING UNITED
	)	STATES' MOTION FOR
	)	SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

These water rights were claimed by LU Ranching Company (LU). This matter is before the court on a *Motion for Summary Judgment* filed by the objector, United States Bureau of Land Management (BLM). Previously, this court held that water rights must be conveyed like any other real property right, and that the failure to properly convey the right may affect the right's priority date. *Order on Motion to Alter or Amend; Order on Motion for Permissive Appeal* (June 26, 1997, subcases 57-04028 *et al.*) at 9. Applying this principle, the United States alleges that LU can claim a priority date no earlier than September 23, 1976, the date LU was created.

On the other hand, LU alleges that the legal principles contained in this court's prior opinion were altered by the 1998 enactment of I.C. § 42-113(2). Citing this statute, LU claims that they are entitled to a priority date dating back to the original allotments obtained from LU's predecessors-in-interest. For the various rights, those dates claimed are December 9, 1941; July 26, 1910; and September 7, 1887.

For the following reasons, the court finds that I.C. 42-113(2) does not have any retroactive effect, and therefore, the United States' *Motion for Summary Judgment* is GRANTED.

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson A.I.A. v. M. L. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). When a party relies on the Director's Report, that party is relieved from offering any facts in support of the summary judgment motion. "The determination of facts by the Director is presumptively correct." *In Re: SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 745, 947 P.2d 409 (1997), citing *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301 (1996). On summary judgment, the party opposing any element in the Director's Report has the burden of raising an issue of material fact in order to defeat summary judgment. I.C. § 42-1411(4). Presumptions may support either the moving or nonmoving party on summary judgment. See e.g., *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

III. FINDINGS OF FACT

The court finds the following undisputed facts:

1. LU Ranching Company is an Idaho Corporation created on September 23, 1976.
2. Significant portions of the claims filed by LU identify places of use on federal public land managed by the BLM. It is only these places of use that are at issue. LU does not have any deed or other type of conveying document that specifically describes the instream stock water rights it has claimed, for the places of use located on the public domain.
3. LU does not assert that it initiated the water rights at issue, but claims instead that the rights were originally appropriated by its predecessors-in-interest, and then conveyed to LU as appurtenances to its base ranch.
4. LU's predecessors-in-interest on the federal allotments are as follows: Warren C. Duncan, December 9, 1941, for water rights 55-10288, 55-10290, 55-10292, 55-10293; Ezra Mills, September 7, 1887, for water rights 55-10295, 55-10296, 55-10297, 55-10298, 55-10299, 55-10300, 55-10301; and George Ewings, July 26, 1910, for water rights 55-10303, 55-13451.
5. The United States has a licensed stock water right in the same grazing allotment where LU Ranching holds a grazing permit. The priority date on this license is 1959. The United States reasserted that license in the SRBA under water right 55-02373. There were no objections to that claim in the SRBA, and the District Court issued a partial decree for that water right on January 30, 1998.

IV. DECISION

A water right in Idaho is a real property interest. IDAHO CONST. art. XV, § 3; I.C. § 55-101. As such, the transfer or conveyance of a water right can only occur if the conveyance is in writing. I.C. § 9-503¹; *see e.g., Olson v. Idaho Dept. Of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983). "Under the statutes of this state, a water right is real estate. . . . [and it cannot be transferred] to another except by a written conveyance such as would convey the title to real estate." *Gard v. Thompson*, 21 Idaho 484, 496, 123 P. 497 (1912). Applying these principles to

¹ 9-503. Transfers of real property to be in writing. -- No estate or interest in real property. . . . can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

the facts, there is no dispute that the earliest priority date LU can claim is September 23, 1976, the date LU was created. This is true because there are no deeds transferring water rights from any entity to LU for the portion of these water rights claimed within the federal allotments currently used by LU.²

LU does not dispute these facts. Rather, it argues that it was not required to obtain deeds for the places of use located within the allotments because it claims that the water rights were transferred to it under the appurtenance provisions of the deeds for the base ranch property. Therefore, regardless of whether any deed or other document conveying title was obtained for the water rights located within the allotments, LU claims that it is entitled to a priority date corresponding to the date the rights were first put to a beneficial use by LU's predecessors-in-interest. LU relies on I.C. § 42-113(2) which reads as follows:

For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.

The issue before the court is whether I.C. § 42-113(2) should have any retroactive effect for water rights claimed prior to March 25, 1998, the date the statute went into effect. Generally, no law is "retroactive, unless expressly so declared." I.C. § 73-101. However, the statute need not use the word "retroactive." "It is sufficient if the enacting words are such that the intention to make the law retroactive is clear." *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965, 968 (1914). In this case, it is clear, and the parties agree, that the legislative intent of I.C. § 42-113(2) is that it be applied retroactively. At the very least, LU argues that the statute should be applied retroactively. If the statute does have retroactive effect, then LU is entitled to the priority dates it claims. If the statute does not have retroactive effect, then the earliest date LU may claim is September 23, 1976. The Idaho Constitution states that "the legislature shall pass no law . . . retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new

² It is true that water rights that are not specifically described in a conveying document do pass as an appurtenance with land on which the water has been used. I.C. § 42-220; see e.g., *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, as previously indicated, there are no deeds conveying any water rights for the places of use claimed on the public domain.

liability in respect to transactions or considerations already past.” IDAHO CONST. art. XI, § 12. “Retrospective legislation is not favored, and is prohibited by the constitution of some of the states, as being highly injurious, oppressive, and unjust” *Lawrence v. Defenbach*, 23 Idaho 78, 83, 128 P. 81 (1912); *Butler v. City of Blackfoot*, 98 Idaho 854, 574 P.2d 542 (1978). New legislation may not “create, enlarge, diminish, or destroy contractual or vested rights.” *Gailey v. Jerome County*, 113 Idaho 430, 745 P.2d 1051 (1987). Retroactive legislation is that which affects substantive and vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transaction or considerations already past. *Ohlinger v. United States*, 135 F. Supp. 40 (D. Idaho 1955); *see also, City of Garden City v. City of Boise*, 104 Idaho 512, 660 P.2d 1355 (1983).

Here, the plain language of 42-113(2) is that it changes the priority dates for one class of water rights. The primary component of a water right in a prior appropriation jurisdiction is its priority date. *See e.g., Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). Once a priority date is determined, that water right is administered “first in time, first in right” relative to other water rights. IDAHO CONST. art. 15, § 5; I.C. § 42-106; *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). Any law that retroactively changes the priority date for one class of water rights is an improper retroactive law because it necessarily prejudices existing water rights which are not benefited by the new legislation.

Prior to the amendment of I.C. § 42-113(2), the earliest priority date LU could claim was September 23, 1976. All other water rights with an earlier priority date were considered senior water rights and, therefore, could be administered “first in time, first in right.” With the new statute, LU’s water rights were assigned new priority dates. The consequence is that all other water rights in the stream system which had been senior water rights for twenty-two years were suddenly junior water rights. As the United States correctly explained:

Most insidiously, the statute changes the hierarchy of water rights by elevating “constitutional” stock water rights and thereby demoting all other types of water rights to a lower rung on the priority ladder. These other rights were established, bought and sold according to the law existing before the change to § 42-113(2), and their order in the hierarchy was their principle value and chief expectation. The new legislation changes that value and upsets those settled expectations.

United States Reply Brief at 17.

LU argues that application of I.C. § 42-113(2) would not prejudice or alter any existing rights because the “[g]overnment has no vested right which would be affected.” *LU Brief* at 2, 4-15.³ This argument is untenable. The United States has many vested rights in water in Idaho that would be impacted, including licensed rights for stock water, previously decreed rights for many purposes, and reserved rights for stock water and other purposes. For example, the United States has a licensed stock water right for the use of water from Kiyi Spring. Kiyi Spring is located on BLM land in a grazing allotment where LU Ranching holds a grazing permit. *Affidavit of Fred Price*. The priority date on this license is 1959. The United States reasserted that license in the SRBA under SRBA subcase no. 55-02373. There were no objections to that claim in the SRBA, and the District Court issued a partial decree for that water right on January 30, 1998. If I.C. § 42-113(2) were applied retroactively, the following would result:

As argued in the United States’ October 15, 1998 Motion for Partial Summary Judgment, under the law that existed prior to § 42-113(2), the earliest date that LU could claim for the right at issue in 55-10300 was September 23, 1976. If the new statute is applied, LU would receive a priority date consistent with “the first date that water historically was used for livestock watering,” a date that the United States has determined was sometime in the 1870s or 1880s. Thus, though junior to the United States’ licensed right under prior law, revised § 42-113(2) would give LU the senior water right at that source, and thereby diminish the value of the United States’ licensed, and unquestionably vested property right.

United States Reply Brief at 19.⁴

To summarize, the court finds that the application of I.C. § 42-113(2) negatively impacts vested property rights because senior water rights not subject to the statute would become junior water rights. Simply stated, I.C. § 42-113(2) benefits some water right owners at the expense of other water right owners. Therefore, the court finds that I.C. § 42-113(2), as applied retroactively,

³ LU argues that the United States does not have any vested water rights claimed in the SRBA. LU relies heavily on *Hidden Springs Trout Ranch, Inc., v. Allred*, 636 P.2d 745 (Idaho 1981), to support its position that the United States does not have vested property rights in water that would be impacted by the new legislation. In that case, the Idaho Supreme Court held that an application for a permit was not a vested property interest. The Court was careful to distinguish an inchoate right such as a permit from other vested water rights. “Initially, it is important to note that we do not discuss the status of one who has acquired an adjudicated right, a licensed right or an unadjudicated ‘constitutional’ right to water as defined in Idaho statutes or the Idaho Constitution. *Hidden Springs* is not on point because it does not apply to adjudicated or unadjudicated licensed or “constitutional” rights owned by the United States and other parties.

⁴ The previously mentioned analysis illustrating injury to a single licensed right caused by I.C. § 42-113(2) could be applied to many other previously senior vested water rights owned by other water users.

is in violation of Article 11, Section 12, of the Idaho Constitution which prohibits the retroactive application of laws that diminish other vested rights.⁵ For these reasons, the priority date for that portion of the water rights located on the public domain shall be September 23, 1976.

IT IS SO ORDERED.

DATED this 8th day of January, 1999.



Fritz X. Haemmerle
Special Master, Snake River Basin Adjudication

CERTIFICATE OF MAILING

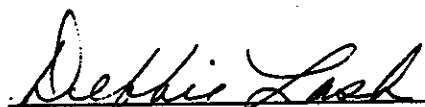
I certify that a true and correct copy of the ORDER GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT was mailed on January 8, 1999, with sufficient first-class postage to the following:

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⁵

Because the court has held that I.C. § 42-113(2) cannot be applied retroactively, the court need not address the issue of whether application of the same statute results in a taking or whether the statute as applied prospectively is unconstitutional.