

Special Master requested that IDWR submit an affidavit explaining the basis of its recommendation. IDWR submitted the *Affidavit of Allen Ruberry*. The *Motion for Summary Judgment* was argued on July 31, 2002.

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 facts rests upon the moving party.

B. Effect of Presumption on Summary Judgment

In the SRBA, *Director’s Reports* have *prima facie* weight. Giving *Director’s Reports* *prima facie* weight confers a presumption that sufficient proof has been made to prevail on each element of a water right. 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 Supreme Court held that 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.

If affidavits are presented which rebut the presumption afforded *Director's Reports*, the presumption ceases to exist. However, if no affidavits are presented, the *Director's Report* remains un rebutted.

C. *Res Judicata*

The doctrine of *res judicata* precludes parties, and their privies, in a final litigation from relitigating in a second suit against the same parties, not only the same claim or demand, but also all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990).

III. RECORD ON SUMMARY JUDGMENT

The record submitted for this *Motion for Summary Judgment* includes the *Affidavit of Allen Ruberry*, the *Affidavit of Attorney Patti Rowland*, the claim, the *Objection*, and the *Director's Report*.

IV. FACTS OF RECORD

A. Prior Decrees

Bert H. Miller was served as a defendant in *Suave v. Abbott*. Miller filed a *Counterclaim of Defendant* asserting that he or his predecessor had diverted and used water for irrigation "of the hereinbefore described lands, and for domestic and other beneficial purposes. . ." *Affidavit of Attorney Patti Rowland* Ex. 1. The counterclaim refers to a posted notice accomplished by Miller's predecessors, James Bramwell and James Cochran. The posted notice states "The purpose for which said water is intended to be used is to irrigate lands claimed by use in Kilgore, Idaho. The place of intended use is Kilgore, Idaho." *Id.* Ex. 2.

The *Memorandum Opinion* in *Suave v. Abbott* states that "this suit involves the adjudication of the use of the waters of Mud Lake and its tributaries, and, like many others of the same general character, presents for solution questions difficult of adjustment in the administration of the irrigation laws in different localities." *Id.* Ex. 4.

The *Decree* in *Suave v. Abbott* states as a definition of use "water herein decreed for use on land shall be construed to include the usual ordinary and customary use thereof for irrigation,

for watering livestock, and for other domestic purposes.” *Id.* Ex. 6. The later *Judgment* in *U.S. v. Singleton* held that the right of Miller decreed in *Suave v. Abbott* was abandoned. *Id.* Ex. 7.

The *Affidavit of Allen Ruberry* sets forth the basis for the *Director’s Report* for this water right. IDWR considered the finding of abandonment in *U.S. v. Singleton*. Because of the finding in *U.S. v. Singleton*, IDWR recommended a separate claim 31-4095 with a priority date after the *U.S. v. Singleton* order. However, IDWR did not recommend this right with a priority date after *U.S. v. Singleton* based on IDWR’S interpretation of the purpose of use in *Suave v. Abbott*. *Affidavit of Allen Ruberry*.

B. Findings not Based on Affidavits

Several conclusions contained in this decision parallel opinions asserted in the *Affidavit of Allen Ruberry*. The court did not, however, rely on the opinions contained in the affidavit in reaching its findings, but made its own determinations of law.

Assertions of opinions of law by witnesses or affiants are generally inadmissible. Although witnesses are not prohibited from testifying on the “ultimate issue” to be reached in a case, I.R.E. 704 was not intended to allow experts to give legal conclusions. “If the expert’s opinion is purely legal conclusion or concerns the law of the case, it is inadmissible. Decisions on the law are not decisions that the jury, the factfinder makes. They are for the judge to make in his capacity as legal officer.” COMMENTS TO THE IDAHO RULES OF EVIDENCE (1985), Comment to Rule 704, p.2 (citations omitted).

V. ANALYSIS

Under the doctrine of *res judicata*, or “claim preclusion,” a final adjudication on a claim or demand precludes the parties to the first action, and their privies, from later relitigating against the same parties not only the same claim or demand, but in addition all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990).

There is no dispute that the *Suave v. Abbott* and *U.S. v. Singleton*. decrees are final adjudications. It is undisputed that Singleton’s predecessor was decreed a water right in *Suave v. Abbott* that was later decreed abandoned or forfeited in *U.S. v. Singleton*. Therefore, the dispositive issue is whether the stockwater claim 31-11440 is the same right that was abandoned in

U.S. v. Singleton or was a claim that should have been brought in *Suave v. Abbott*.

VI. CONCLUSION

This Special Master finds that the term “use” defined in *Suave v. Abbott* as water used for usual ordinary and customary use for irrigation, for watering livestock, and other domestic purposes is ambiguous. It is unclear whether the “use” intended by the *Suave v. Abbott* court meant to include all stockwater rights whether or not derivative of an irrigation right. Similarly, it is ambiguous whether *Suave v. Abbott* meant to require the filing of all stockwater rights, even those not related to irrigation. There is ample support of record indicating the term “use” in *Suave v. Abbott* intended only incidental stockwater use.

Many of the pleadings and orders focus primarily on the irrigation aspects of water rights, leaving an inference that the stockwater uses were incidental only. For example, Bert H. Miller’s *Counterclaim* asserts that Miller or his predecessors diverted and used the water for irrigation, domestic and other beneficial purposes. *Affidavit of Attorney Patti Rowland* Ex. 1. Miller’s predecessors originally established Miller’s water right by posting notice. The notice states “The purpose for which said water is intended to be used is to irrigate lands claimed by us.” *Id.* Ex. 2. (emphasis added)

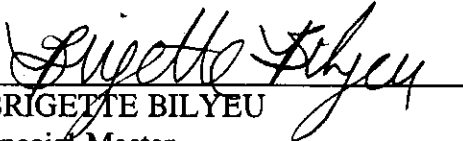
The *Statement of Claims* of Bert H. Miller sets forth that “proof of the continuous and beneficial use of the water of Dry Creek herein it is shown that upward of 125 acres of said 160 acres has been continuously irrigated by the said Bert H. Miller and his predecessor in interest since 1903. . .” *Id.* Ex. 3. (emphasis added). The *Findings of Fact and Conclusions of Law* in *Suave v. Abbott* states that Bert H. Miller’s water rights were “to be irrigated and hereinafter described. . . .” *Id.* Ex. 5. (emphasis added)

On the other hand, there is language in *Suave v. Abbott* that could mean that all stockwater uses were intended to be included. The *Decree* in *Suave v. Abbott* states that “use” is “water herein decreed for use on land shall be construed to include the usual ordinary and customary use thereof for irrigation, for watering livestock, and for other domestic purposes.” *Id.* Ex. 6.

This Special Master finds there are genuine issues of material fact that remain as to whether the stockwater use claimed in 31-11440 was decreed in *Suave v. Abbott* and abandoned in

U.S. v. Singleton. Because of the ambiguity of the term “use” as it relates to stockwater uses, it is unclear whether the *Suave v. Abbott* adjudication required all stockwater uses to be filed. Genuine issues of material fact remain. THEREFORE, the *Motion for Summary Judgment* is **denied**.¹

DATED August 22, 2002.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

¹ This Special Master notes that the issues remaining for trial are quite narrow. The Claimant may face the prospect of a *Director's Report* where the “bubble has burst” as to the presumption on priority. The Claimant may be required to put on facts at trial regarding the *Suave v. Abbott* decree and *U.S. v. Singleton* decree. If the Claimant proves *Suave v. Abbott* and *U.S. v. Singleton* do not prevent him from claiming a priority date of June 21, 1902, he may have the burden of proving the priority date.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on August 22, 2002, with sufficient first-class postage to the following:

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