

RECEIVED

AUG 23 2002

Department of Water Resources

2002 AUG 22 PM 4:37

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED jc

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	)	ORDER ON SUMMARY JUDGMENT
	)	
Case No. 39576	)	
	)	SUBCASE NOS. 31-11700 AND 31-11701
	)	

I. PROCEDURAL BACKGROUND

Nick, Ron, and Randy Hillman filed claims for these water rights April 9, 2001. The claims state that the basis for these rights is beneficial use:

This claim is based on a Notice of water right from the Fremont County Records. Frank Serfas, 19 October 1897. Not enjoined to the Suave Decree, 1930. Stockwater place of use same as irrigation. Permissible place of use with other rights; 31-82, 31-83, 31-84, 31-85, 31-86. This right is limited to 200 acres.

See, Notice of Claim to a Water Right Acquired Under State Law. IDWR recommended these rights essentially as claimed.

Objections were filed by Margaret, David and James Hagenbarth. The *Objections* assert that 31-11700 and 31-11701 are duplicate filings of 31-82.¹ Hagenbarths also assert that 31-11700 and 31-11701 were not decreed in prior adjudications that were intended to decree all water rights in West Camas Creek and its tributaries. *Cartier v. Buck* (Idaho, Fifth Jud. Dist. (June 20, 1902)); *Suave v. Abbott* No. 635 (U.S. D. Idaho E. Div. (Nov. 1, 1930)).

Objectors James, David and Margaret Hagenbarth filed a *Motion for Summary Judgment* asserting that these two water rights should not exist or that these two water rights should have priority dates no earlier than November 2, 1930. The *Motion for Summary Judgment* relies on a legal theory that water rights 31-11700 and 31-11701 were not decreed by earlier adjudications

¹ Water right 31-82 was decreed by the SRBA District Court on May 1, 2002.
ORDER ON SUMMARY JUDGMENT
G:/31 ORDERS/11700.etal.ORDR.S.J.MOTN
8/22/02

that were intended to decree all water rights in West Camas Creek and its tributaries. Hagenbarths argue that the doctrine of *res judicata* establishes as a matter of law that these water rights cannot exist with a priority date of October 19, 1897. Hagenbarths filed the *Affidavit of Attorney Patti Rowland* with attachments including portions of the *Complaint*, *Affidavit of Service*, *Order Directing the Bringing in of other Parties*, *Frank Serfas Demur to the Cross Complaint*, *Answer and Cross Complaint*, *Decision*, *Findings of Fact and Conclusions of Law* and *Decree in Cartier v. Buck* and *Counterclaim*, *Statement of Claim of Clients*, *Memorandum Opinion*, *Findings of Fact and Conclusions of Law* and *Decree in Suave v. Abbott*. Hillmans did not file any affidavits. This 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 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. If no affidavits are presented, however, 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 claims, the *Objections*, and the *Director's Reports*.

IV. FACTS OF RECORD

A. Prior Decrees

The plaintiff in *Cartier v. Buck* filed a complaint seeking to determine the water rights on Camas Creek and its tributaries. *Affidavit of Attorney Patti Rowland* Ex. 2. Frank Serfas was named as a defendant in the complaint and was served on November 22, 1901. *Id.* Ex. 3. Frank Serfas filed an *Answer & Cross Complaint* asserting his rights to Bear Creek. *Id.* Ex. 5. In 1902, the *Cartier v. Buck* court considered "claimed portions of the waters of Camas Creek and its tributaries." *Id.* Ex. 7.

A later court adjudicated water rights on Camas Creek and its tributaries in *Suave v.*

Abbott. *Id.* Ex. 10, 11, 12 & 13. M. Hillman claimed water rights located on West Camas Creek, Bartlett Spring and Goudy Springs all tributary to Camas Creek. *Id.* Ex. 10. M. Hillman was decreed rights in West Camas Creek, Goudy Springs and Bartlett Springs. *Id.* Ex. 11, 12 & 13. M. Hillman was the predecessor in interest to the claimants for some water rights. *Cartier v. Buck* and *Suave v. Abbott* are both final decrees.

B. Findings not Based on Affidavit

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 conclusions, 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

A. Analysis Under Doctrine of *Res Judicata*

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); *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983). Under the facts alleged in this case, *res judicata* does not bar Hillmans from asserting a priority date earlier than November 2, 1930.

B. Prior Decrees

There is no dispute that the *Cartier v. Buck* and *Suave v. Abbott* decrees are final adjudications. The dispositive issue is whether these water rights were a “claim arising out of the same transaction” which was the subject matter of the *Cartier v. Buck* and *Suave v. Abbott* litigation and which should have been made in these prior actions. In other words, were

Hillmans' predecessors required to claim these water rights in *Cartier v. Buck* or *Suave v. Abbott*? The record from the *Cartier v. Buck* decree contains several relevant documents. The *Decision* states that the parties are entitled to various amounts of water, but merely sets forth the name of the parties, the priority and the quantity. *Affidavit of Attorney Patti Rowland* Ex. 6. Frank Serfas asserted at one point, rights on Bear Creek. *Id.* Ex. 5.

The *Decree* states that "a large number of persons not named in the original Complaint claimed portions of the waters of Camas Creek and its tributaries [and] an order was duly made that said parties be brought in" Ex. 8. Frank Serfas was decreed a water right for 80 inches May 1, 1898. *Id.* Ex. 8.

The record from the *Suave v. Abbott* decree contains several relevant documents. The *Counterclaim of Defendant M. Hillman* asserts that *Cartier v. Buck* adjudicated "the rights to the use of the water of Camas Creek and its tributaries. . ." *Id.* Ex. 9. The *Statement of Claims of Clients of F. A. Miller and B. H. Miller* asserts three water rights for M. Hillman including one on West Camas Creek, one on Goudy Springs and one on Bartlett Springs. *Id.* Ex. 10. The *Suave v. Abbott Memorandum Opinion* states that "this suit involves the adjudication of the use of the waters of Mud Lake and its tributaries. . ." *Id.* Ex. 11. The *Decree* in *Suave v. Abbott* lists the three rights of M. Hillman on West Camas Creek, Goudy Springs and Bartlett Springs. *Id.* Ex. 13. No rights to Bear Creek were adjudicated in either decree.

VI. CONCLUSION

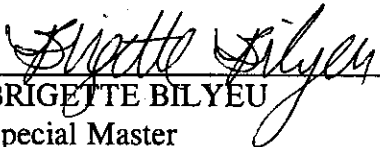
Hagenbarths argue that *Cartier v. Buck* and *Suave v. Abbott* were intended to adjudicate all water rights to Camas Creek and its tributaries. Hillmans dispute that conclusion, arguing that no rights to Bear Creek were intended to be adjudicated since none were included. The SRBA has considered the impact of prior decrees on the elements of current water rights. Unlike the SRBA, many decrees such as *Cartier v. Buck* and *Suave v. Abbott* were private decrees, and it is often difficult to determine the intended scope of these prior decrees.

For example, in the *Master's Report and Recommendation* for water right 34-10167, this Special Master considered a similar issue regarding whether a water right not included in the *Utah Construction* decree, adjudicating rights to the Big Lost River, should have been claimed during that prior litigation. The claimant in 34-10167 argued that his right on Thousand Springs was not required to be brought in the *Utah Construction* litigation because it was not known at the time of

the prior decree that Thousand Springs was tributary to the Big Lost River. The claimant in that case presented evidence regarding how claims were made in *Utah Construction* that ultimately persuaded the Court that the *U.C. Decree* did not bar his claim with a priority date before *Utah Construction. Masters Report and Recommendation* (Subcase No. 34-10164 (Oct. 8, 1996))

This Special Master concludes that the scope of water rights intended to be included in *Cartier v. Buck* and *Suave v. Abbott* is ambiguous. Although Bear Creek is apparently tributary to Camas Creek, no rights to Bear Creek were previously decreed in *Cartier v. Buck* or *Suave v. Abbott*. Therefore, genuine issues of material fact remain as to the scope of the rights intended to be included in *Cartier v. Buck* and *Suave v. Abbott*. Accordingly, the *Motion for Summary Judgment* is **denied**.²

DATED August 22, 2002.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

² This Special Master notes that the issues remaining for trial are quite narrow. The claimants may face the prospect of a *Director's Report* where the "bubble has burst" as to the presumption on priority. The Claimants may be required to put on facts at trial regarding the *Cartier v. Buck* and *Suave v. Abbott* decrees. If the Claimants prove that the *Cartier v. Buck* and *Suave v. Abbott* courts did not consider Bear Creek tributary to Camas Creek, or that those courts did not intend to include the rights on Bear Creek, they may then 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:

MARGARET HAGENBARTH

Represented by:

BLOOMQUIST, JOHN E.

DONEY, CROWLEY, BLOOMQUIST

108 S WASHINGTON

PO BOX 1418

DILLON, MT 59725

Phone: 406-683-8795

MARGARET HAGENBARTH

Represented by:

MICHAEL C. CREAMER

PO BOX 2720

BOISE, ID 83701-2720

Phone: 208-388-1200

NICK R HILLMAN

RANDY J HILLMAN

RON R HILLMAN

Represented by:

RAY W. RIGBY

PO BOX 250

REXBURG, ID 83440-0250

Phone: 208-356-3633

DIRECTOR OF IDWR

PO BOX 83720

BOISE, ID 83720-0098