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DEC 03 1997

Department of Water Resources

11 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
12 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

13
14 In Re SRBA)
15) OBJECTORS' MOTION FOR SUMMARY JUDGMENT
16 Case No. 39576) Subcase Nos. 34-02428, 34-07096,
17) 34-07097, 34-07223, 34-12416
18)

19 **DESCRIPTIVE SUMMARY**

20 This is the motion for summary judgment filed in the five above-captioned subcases by
21 the Objectors, Kirby A. Jensen and Doyle Jensen.

22 **MOTION FOR SUMMARY JUDGMENT**

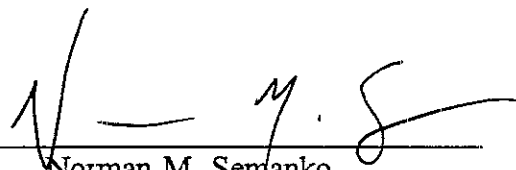
23 COME NOW the Objectors in the five above-captioned subcases, Kirby A. Jensen and
24 Doyle Jensen, through counsel, pursuant to IRCP 56 and SRBA Administrative Order 1
25 (Amended 10/16/97), and move this court for summary judgment in favor of said Objectors.
26

1 The grounds for this motion are that no genuine issue of material fact exists and that the
2 Objectors are entitled to judgment as a matter of law, as further set forth in the Objectors'
3 Memorandum in Opposition to Claimant's Motion for Summary Judgment and in Support of
4 Objectors' Motion for Summary Judgment, filed herewith.
5

6 The Objectors request the opportunity to participate in oral argument, consistent with the
7 court's decision in this regard.
8

9 DATED this 10th day of December, 1997.

10 ROSHOLT, ROBERTSON & TUCKER

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12 By: 
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14 Norman M. Semanko
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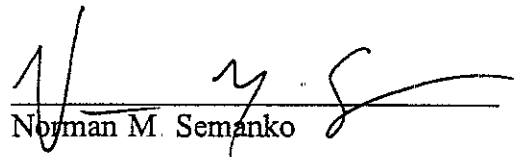
CERTIFICATE OF MAILING

I hereby certify that on this 10th day of December, 1997, I served a copy of the foregoing OBJECTORS' MOTION FOR SUMMARY JUDGMENT, by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

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Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
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Department of Water Resources

11 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
12 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

13
14 In Re SRBA) MEMORANDUM IN OPPOSITION TO CLAIMANT'S
15) MOTION FOR SUMMARY JUDGMENT AND IN
16) SUPPORT OF OBJECTORS' MOTION FOR
17) SUMMARY JUDGMENT
18 Case No. 39576) Subcase Nos. 34-02428, 34-07096,
19) 34-07097, 34-07223, 34-12416
20)

21 DESCRIPTIVE SUMMARY

22 This is the memorandum of the Objectors, Kirby A. Jensen and Doyle Jensen: (1) in
23 opposition to the motion for summary judgment and supporting memorandum filed by the
24 Claimant, Mitchell D. Sorensen, against objections filed by the Jensens; and (2) in support of
25 the motion for summary judgment filed herewith by the Jensens.
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MEMORANDUM IN OPPOSITION TO CLAIMANT'S MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF OBJECTORS' MOTION FOR SUMMARY JUDGMENT

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BACKGROUND

A trial on the five above-captioned subcases, involving five ground water claims filed by Mitchell D. Sorensen, is scheduled for January 28, 1998. The parties include the Claimant, Mitchell D. Sorensen, and three Objectors, the Big Lost River Water Users Association (BLRWUA), Kirby A. Jensen and Doyle Jensen. The relevant issues raised by the Jensens in these five subcases include quantity, points of diversion, places of use, and various combined use remarks. Several of these issues overlap significantly with those of BLRWUA.

On or about December 1, 1997, the Claimant filed a motion for summary judgment and supporting memorandum in the five above-captioned subcases. The motion purported to ask the court for summary judgment against the Jensens. No service of these documents was made on Objector BLRWUA, even though it is undoubtedly a party to two of the above-captioned subcases and the issues raised in the motion and supporting brief overlap with those raised by BLRWUA's objections.¹

The Objectors, Kirby and Doyle Jensen, also filed a motion for summary judgment, herewith, on December 1, 1997.

The facts pertinent to this matter are contained in the sworn objections filed by the Jensens, the responses filed by the Department and the Supplemental Director's Report for the

¹ An additional motion for summary judgment was filed by the Claimant Mitchell D. Sorensen and several other claimants in forty-one subcases, including 34-02428 and 34-07223, on November 13, 1997. The motion asks for summary judgment against BLRWUA and was not served on the Jensens, even though the Jensens are parties to the two above-referenced subcases. This memorandum addresses only the motion filed against the Jensens in the five above-captioned subcases. However, there is some significant overlap with the issues raised in the motion filed against BLRWUA.

1 five ground water rights, as well as other documents included in the Appendix accompanying
2 the Claimant's motion, all of which are already part of the record.

4 ARGUMENT

5 I. SUMMARY JUDGMENT CANNOT BE GRANTED FOR THE CLAIMANT AND 6 SHOULD BE GRANTED FOR THE OBJECTORS.

7 A. The Required Service Was not Provided to BLRWUA.

8 A copy of all documents filed in a subcase must be served on all other parties to the
9 subcase. SRBA Administrative Order 1, Sec. 10.h. (Amended 10/16/97). This was not done.
10 BLRWUA is a party to two of the above-captioned subcases, yet no service was provided to
11 them. See, Certificate of Service (attached to Motion for Summary Judgment and Memorandum
12 in Support of Claimants' Motion for Summary Judgment).

13 Many of the issues raised in the Claimant's motion against the Jensens overlap
14 significantly with issues raised by BLRWUA. Granting summary judgment to the Claimant
15 without following the correct notice procedures would be a denial of due process to BLRWUA.
16 For this reason alone, summary judgment should not be granted to the Claimant in the above-
17 captioned subcases.

18 B. The Facts Before the Court Do Not Support Summary Judgment for the Claimant, 19 but Rather for the Objectors.

20 The Claimant contends "that none of the objections of the Jensens raise any issue of fact,
21 and that there is therefore no dispute as to any material fact. It appears to us that the court
22 should dispose of any relevant legal issues as a matter of law." Memorandum in Support at 4.
23 The Jensens agree that many of the necessary facts are before the court and that, as a matter of
24 law, many of the issues may be decided -- in favor of the Jensens.

1 The Claimant provides no affidavit or additional factual support for his motion, relying
2 instead on the verified notices of claim, the objections, responses filed by the Idaho Department
3 of Water Resources, and the Supplemental Director's Report for Water Right Nos. 34-00496A,
4 34-00692D, 34-02428, 34-07096, 34-07097, 34-07223 and 34-12416, all of which are included
5 as an Appendix to the motion. Motion for Summary Judgment at 2. However, as explained
6 more fully below, the Department's responses and the Supplemental Director's Report do not
7 support the Claimant's motion for summary judgment, but rather the Objectors' motion for
8 summary judgment.
9

10
11 For the court's convenience, the Objectors will address the issues below in the same
12 order that the Claimant does in his supporting memorandum.

13 **1. Quantity (Box 3).**

14 The Claimant states that there is no factual or legal issue about the quantity which
15 should be decreed for claim nos. 34-07096 and 34-07097. We agree that there is no genuine
16 issue of material fact. However, the law dictates that summary judgment be granted in favor
17 of the Jensens.
18

19 The 1983 field exam made by the Department for permit nos. 34-07096 and 34-07097
20 measured the capacity of the well located on Kirby Jensen's farm in Section 17 as 3.42 cfs.
21 Sorensen and the Department claim that an additional 2.7 cfs should be recognized because it
22 has been pumped from a different well located on the Claimant's mother's farm, located in
23 Section 5. The permits have never been licensed.
24

25 The appropriate factual and legal question is not whether the additional 2.7 cfs was
26 pumped before 1987, but whether it was pumped and put to beneficial use under the two

1 permits during the authorized development period for the two permits, 1975-1980. See, I.C.
2 Secs. 42-204, 42-217, 42-219, 42-220.
3

4 The two permits were granted by the Department during 1975 and proof of beneficial
5 use for the two permits was due, and submitted by the previous owner, Boyd Burnett, during
6 1980. IDWR Response to Objection in Subcase No. 34-07096, p. 1 of "Reasons Supporting
7 Each Box Checked" (June 30, 1993). The level of beneficial use at that time was the 3.42 cfs
8 that was pumped from the well located on Kirby Jensen's farm in Section 17. Additional
9 development which occurred under the permits after 1980 was not authorized and cannot be
10 recognized.
11

12 There is nothing in the record to indicate that Boyd Burnett owned or used the well
13 located on Mitch Sorensen's mother's farm in Section 5 during the authorized development
14 period. The well is owned and used by Sorensen. As a result, it is impossible to conclude that
15 Burnett somehow pumped the additional 2.7 cfs from the Sorensen well between 1975 and
16 1980. In addition, Mitch Sorensen did not even own the two permits during the authorized
17 development period, having acquired them after the development period, and could not have
18 used them during the authorized development period, 1975-1980. They were owned and used
19 by Burnett. Id.
20

21 The Department's conclusion on page 11 of the Supplemental Director's Report that
22 "Mr. Sorensen has used this additional capacity [from the Section 5 well] for irrigation" does
23 not mean that it is proper to include it as part of claim nos. 34-07096 and 34-07097. Certainly,
24 it is not proper because this "additional capacity" was not utilized during the authorized
25 development period at a time when Mr. Sorensen owned and controlled the permits. It is not
26

1 enough to have used the water prior to 1987. This is not an amnesty statute question.² Rather,
2 it is a question of the extent of development during the authorized development period, 1975-
3 1980.
4

5 The facts clearly show that this level was only 3.42 cfs, and only from the well located
6 on Kirby Jensen's farm in Section 17, for use on Kirby Jensen's farm. Neither the Department
7 nor the SRBA Court has the ability to authorize the appropriation of the additional water from
8 the Section 5 well without having the Claimant apply for and acquire a new permit for this
9 additional amount. See, I.C. Secs. 42-201, 42-202, 42-203A. The enlargement statute allows
10 increases in acres irrigated to be recognized if they occurred prior to the commencement of the
11 SRBA. However, it does not authorize increases in diversion rate. I.C. Sec. 42-1426.
12

13 As a result, summary judgment on this issue cannot be granted to the Claimant and
14 should be granted to the Jensens, recognizing the combined quantity for these two rights as 3.42
15 cfs, not 6.12 cfs. In addition, all combined use remarks which refer to a total combined
16 diversion rate of 11.55 cfs must be similarly reduced by 2.7 cfs, to 8.85 cfs.
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23 ² On this combined question of point of diversion and amount,
24 the Department improperly concludes: "This is an accomplished
25 partial change in point of diversion of these rights. . . ." IDWR
26 Response to Objection in Subcase No. 34-07096 (June 30, 1993). No
consideration is given by the Department to the level of beneficial
use during the authorized development period, 1975-1980. The only
focus is on what occurred prior to the commencement of the SRBA.

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2. Points of Diversion (Box 5).

The Claimant contends that the factual or legal issues regarding the points of diversion have been resolved. With regard to claim nos. 34-02428 and 34-07223, this is true.³ However, the Jensens' concerns about the points of diversion for 34-07096, 34-07097, and 34-12416 remain. These issues can be resolved in the Jensens' favor on summary judgment.

As explained above, permit nos. 34-07096 and 34-07097 were not pumped from the well in Section 5 during the authorized development period, only from the well located on Kirby Jensen's farm in Section 17. In addition, the entire 3.4 cfs is pumped, and has always been pumped, from the well located in Section 17. Sorensen himself contends that "Jensen has continually pumped the 3.4 CFS". Memorandum in Support at 5.

There was no additional water developed during the authorized development period, 1975-1980, which Sorensen could pump from the well in Section 5 after acquiring the permits. No actual change having occurred, the Claimant cannot rely upon the accomplished transfer statute, I.C. Sec. 42-1425. He also cannot rely on the enlargement statute to recognize his use of the additional capacity. I.C. Sec. 42-1426.

As a result, as a factual and legal matter, only the well in Section 17 can be included as a point of diversion for these two rights and the Section 5 point of diversion included in the Department's recommendations should be deleted for both 34-07096 and 34-07097. The

³ However, the explanatory material for both of these rights needs to be revised or deleted to be consistent with the conclusion that the Section 8 well is the point of diversion for 34-07223 only and that the Section 5 well is not a point of diversion for 34-07096 or 34-07097, as explained below.

1 remarks and explanatory material should also be revised or deleted, consistent with this
2 conclusion.
3

4 With regard to claim no. 34-12416, the Department has included the well located on
5 Kirby Jensen's farm in Section 17 as a point of diversion, along with the well located in Section
6 5. The Section 17 point of diversion must be removed.

7 The place of use for 34-12416 is the 945 acres owned by Sorensen. The Department
8 has concluded that this place of use cannot physically be served by the Section 17 well. This
9 served as the basis for removing Section 17 from the recommendation for 34-02428.
10 Supplemental Director's Report at 7. This same rationale applies to 34-12416.
11

12 In addition, the Section 17 well has never been used to irrigate lands other than those
13 in Section 17, thus eliminating any reliance upon the accomplished transfer statute. I.C. Sec.
14 42-1425.
15

16 Finally, Sorensen himself expresses his understanding that "the Section 17 well on
17 Kirby's farm is recommended only as a point of diversion for rights nos. 34-07096 and 34-
18 07097". Memorandum in Support at 6. However, it is still listed in the Department's
19 recommendation for 34-12416 and should be deleted as a point of diversion.

20 3. Place of Use (Box 9).

21 Sorensen argues that the Supplemental Director's Report eliminates the Jensens' concerns
22 about the place of use for the five ground water rights. Actually, it does not. In addition, we
23 believe the facts and the law justify summary judgment in favor of the Jensens.
24
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26

1 Water right nos. 34-07223, 34-07096 and 34-07097 are all listed in the Department's
2 recommendations with a place of use of 828 acres, which is the land owned by Sorensen and
3 located in the Era Flat.
4

5 As the Department concluded and Sorensen concedes, the only point of diversion for 34-
6 07223 is the Section 8 well located on Doyle Jensen's farm. The license for this right
7 recognizes the irrigation of approximately 80 acres, all located in Section 8, and the well has
8 never been used to provide water to the 828 acres owned by Sorensen.
9

10 Similarly, as explained in detail above, the only point of diversion for 34-07096 and 34-
11 07097 is the Section 17 well located on Kirby Jensen's farm. The only lands which have ever
12 been irrigated with these rights are those located on Kirby Jensen's farm, all located in Section
13 17, and the well has never been used to provide water to Sorensen's 828 acres.
14

15 Given these realities, it is difficult to understand how a place of use of 828 acres can be
16 recognized for these three rights. Even the fact that these rights are subject to exchanges with
17 surface water rights owned by the Jensens does not explain the huge increase in acres.
18

19 The Objectors' understanding of the accomplished transfer statute is that it allows the
20 Department and the SRBA Court to recognize changes in places of use that have actually
21 occurred prior to the commencement of the SRBA. I.C. Sec. 42-1425. It is a factual certainty
22 that none of the three rights referred to above have ever been used to irrigate any of Sorensen's
23 828 acres, let alone all of them.
24

25 Therefore, summary judgment should be granted, recognizing the places of use of these
26 three rights consistent with the license, permits, field exams, and draft licenses which have been

1 issued or prepared by the Department, not the 828 acres recommended by the Department in
2 the SRBA.
3

4 Similarly, 34-02428 and 34-12416 should be decreed only to acres which the facts
5 demonstrate have actually been irrigated through authorized use of the well located in Section
6 5, not all 945 acres. As explained above, the total place of use recognized cannot include acres
7 irrigated by the additional 2.7 cfs capacity which the Claimant contends should be recognized
8 under 34-07096 and 34-07097. In addition, the "permissible place of use" concept cannot be
9 used to grant permission to irrigate acres which have not actually been irrigated using 34-02428
10 and 34-12416. The accomplished transfer statute only recognizes actual changes.
11

12 4. Consumptive Use (Box 10).

13 The Jensens' objections regarding consumptive use have been mooted by the Idaho State
14 Legislature's intervening decision to remove consumptive use as an element to be decreed in
15 the SRBA. I.C. Sec. 42-1411. As a matter of law, the consumptive use element should be
16 deleted for each of the five ground water rights. This is already reflected in the Department's
17 October 23, 1997 revised recommendations, attached to the Supplemental Director's Report.
18

19 5. Remarks (Box 11).

20 Most of the combined use remarks of the original recommendations, to which the
21 Jensens objected, are now included under individual elements (i.e., quantity and place of use).
22 Others are included in explanatory material (i.e., points of diversion and expansion). This does
23 not make them any less important.
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1 As argued above, the combined use remark for quantity should be reduced by 2.7 cfs,
2 from 11.55 cfs to 8.85 cfs, to reflect the fact that 34-07096 and 34-07097 may be recognized
3 only in the combined amount of 3.42 cfs, not 6.12 cfs.
4

5 In addition, as also explained above, the 828 and 945 acre permissible places of use
6 expand greatly upon the actual use of the rights and must be revised to exclude acres irrigated
7 by the 2.7 cfs referred to above. The remarks relating to place of use must likewise be revised.
8

9 With regard to points of diversion, the explanatory material must be revised to make
10 clear that the Section 17 well is not a point of diversion for any right except 34-07096 and 34-
11 07097, and that the Section 5 well is not a point of diversion for 34-07096 or 34-07097, but
12 only 34-02428 and 34-12416.

13 Finally, the explanatory material which states that 34-12416 is an expansion of 34-07223,
14 34-07096 and 34-07097 is incorrect and must be deleted. These three rights have only been
15 diverted and used on the Jensens' farms in Section 8 and 17 and have never been used on the
16 Era Flat lands owned by Sorensen, let alone expanded in use on these acres. Therefore, 34-
17 12416 can only be an expansion of 34-02428, not the other three rights.
18

19 6. Other (Box 14).

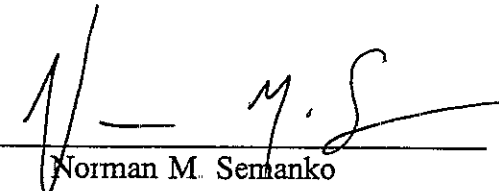
20 These points have been addressed above, demonstrating that the water rights are not all
21 interconnected and do not all have the same points of diversion and places of use.
22

23 CONCLUSION

24 For the reasons set forth above, the Objectors, Kirby A. Jensen and Doyle Jensen,
25 respectfully request that the Claimant's motion for summary judgment be denied and that the
26 motion for summary judgment filed by said Objectors be granted.

1 DATED this 10th day of December, 1997.

2
3 ROSHOLT, ROBERTSON & TUCKER

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5 By: 

6 Norman M. Semanko
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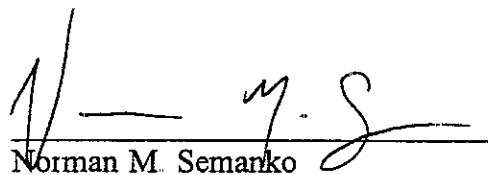
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