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Department of Water Resources

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

	)	
	)	MOTION FOR SUMMARY JUDGMENT
In Re SRBA	)	
	)	
	)	Subcase Nos. 34-02428, 34-07096,
Case No 39576	)	34-07097, 34-07223, 34-12416
	)	
_____	)	

DESCRIPTIVE SUMMARY

This is a Motion for Summary Judgment on five subcases involving water rights held by claimant, Mitchell D. Sorensen, in which Kirby A. Jensen and J. Doyle Jensen have filed objections to the Director's report, and on which trials are scheduled for next January.

MOTION

Mitchell D. Sorensen hereby moves this court for summary judgment against the objectors, Kirby A. Jensen and J. Doyle Jensen, with respect to the objections filed by each to the above numbered water rights claims, each of which were recommended in the

Director's report filed for Test Basin No. 1, the Big Lost River Basin or Water District No. 34, on the grounds and for the reason that no genuine issue of material fact is raised by any of said objections, and that claimant is entitled to judgment against said objectors with respect to each such objection as a matter of law. The arguments of claimant in favor of this motion are set out in claimant's accompanying Memorandum in Support of Motion for Summary Judgment and this motion is based upon the pleadings presently before the court herein, including:

- a. The verified claims filed by Mitchell D. Sorensen.
- b. The Director's report for Basin 34 (Big Lost River Basin), dated May 27, 1992, together with all relevant amendments or supplements thereto,
- c. The verified objections filed by Kirby A. Jensen and J. Doyle Jensen, dated February 23, 1993,
- d. The verified responses to the objections filed by IDWR,
- e. The affidavit of Carter Fritschle, dated October 27, 1997, with the attached Supplemental Director's Report, incorporated therein by reference.

Claimant is willing to participate in oral argument hereon consistent with the court's wishes.

Dated this 26th day of November, 1997.



Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P L L C

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof

DOCUMENT SERVED: MOTION FOR SUMMARY JUDGMENT

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Dated: 11/26/97

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Attorneys for Claimant

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

	)	MEMORANDUM IN SUPPORT OF
	)	CLAIMANT, MITCHELL D.
In Re SRBA	)	SORENSEN'S, MOTION FOR
	)	SUMMARY JUDGMENT
Case No. 39576	)	
	)	Subcase Nos. 34-02428, 34-07096,
	)	34-07097, 34-07223, 34-12416
_____	)	

DESCRIPTIVE SUMMARY

This memorandum sets forth the relevant facts and the legal arguments in support of claimant's motion for summary judgment on the objections of Kirby A. Jensen and J. Doyle Jensen filed to the recommendations of the director's report as to the above numbered water right claims.

MEMORANDUM

Mitchell D. Sorensen and his wife are the owners and/or operators of irrigated farmland in Water District 34 (Big Lost River Basin) which is irrigated by means of water

diverted pursuant to, inter alia, the above numbered water rights. Approximately 117 of the irrigated acres located relatively near the Big Lost River are owned by Mr. Sorensen's mother (Norma K. Sorensen), and are leased and operated by him. An additional 828 irrigated acres, owned and operated by Mr. Sorensen and his wife, are located some three miles west, and four or five miles south of the 117 acres in an area known locally as "Era Flats." The total irrigated farmland, comprised of about 945 acres, is all irrigated with water diverted from Big Lost River and ground water wells under surface and ground water rights which include the above numbered rights.

Right no. 34-02428 is a ground water right, under which ground water is pumped from a well on Mr. Sorensen's mother's farm, and used to irrigate both 117 acres there and a portion of the Era Flats farm.

Rights nos. 34-07096 and 34-07097 are ground water rights under which water is diverted from a well located on the Kirby Jensen farm and used for sprinkler irrigation of Mr. Jensen's farm pursuant to an IDWR approved exchange with water diverted from the Big Lost River under a surface water right of the Jensens, which is conveyed through a canal system to Sorensen's Era Flats farmland. An additional portion of the water diverted under these two rights is diverted from the well on Mr. Sorensen's mother's land from which water is also diverted under right no. 34-02428, and conveyed through a canal system to the Sorensen's Era Flats farmland.

Right no. 34-07223 is a ground water right under which ground water is pumped from a well on the Doyle Jensen farm, and used for sprinkler irrigation of that farm pursuant to an IDWR approved exchange with water diverted from Big Lost River under a surface water right of Mr. Jensen, and conveyed through a canal system to Sorensen's Era Flats farmland.

Right no. 34-12416 is an enlargement water right, covering the extra acres on the Era Flats lands which have been historically irrigated by Mr. Sorensen under the combination of water rights under which water is diverted and conveyed to those lands. This right is more fully explained, as are the other recommendations for the four previously mentioned rights, in the supplemental report attached to the affidavit of Mr. Carter Fritschle.

In 1989, Mitchell and Elaine Sorensen filed SRBA claims for each of the above numbered rights except 34-12416. The claim for 34-12416 was prepared by IDWR and filed at its request in 1992.

The director's report for Basin 34, which includes a recommendation for each of the above numbered rights or claims, was filed May 27, 1992. It has been explained and supplemented with respect to each of these rights as set out in the supplemental report attached to Mr. Fritschle's affidavit.

Objections to the Director's report were filed by Kirby A. Jensen and J. Doyle Jensen with respect to each of the five above numbered water rights claims about March 1, 1993. In addition, objections have recently been filed on behalf of the Jensens with respect to SRBA claim no. A34-12416 by Mr. Norman M. Semanko.

We have prepared and filed herewith an appendix, which contains copies of the Sorensens' claims to the five water rights, the 1992 director's recommendations for each of the five claims contained in the director's report for Basin 34, the objections filed by Mr. Kirby A. Jensen and J. Doyle Jensen to each of such claims in 1993 and 1997, the response to each of such objections by IDWR which were also filed in 1993, and the affidavit of Carter Fritschle, attached to which is the Supplemental Director's Report, dated October 27, 1997

It is the position of the claimants that none of the objections of the Jensens raise any issue of fact, and that there is therefore no dispute as to any material fact. It appears to us that the court should dispose of any relevant legal issues as a matter of law. As we understand Idaho law, unless there is a genuine dispute as to a material fact, each subcase may be decided on the legal issues, and summary judgment "... shall be rendered forthwith" if "... the moving party is entitled to judgment as a matter of law." IRCP Rule 56(c); *G&M Farms v Funk, Irr. Co* 119 Idaho 514, 808 P 2d 851 (1991); *Burgess v. Salmon River Canal Company*, 119 Idaho 299, 805 P 2d 1223 (1991); *Kugler v. Drown*, 119 Idaho 687, 809 P.2d 1166 (Ct. App. 1991); *Olsen v. Freeman*, 117 Idaho 706, 791 P 2d 1285 (1990); *Rossen v. United Steel Workers of Am* , 111 Idaho 630, 726 P.2d 742 (1986); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 118 (1985); *Schaefer v Ellswood Trailer Sales*, 95 Idaho 654, 516 P.2d 1168 (1973).

In a general adjudication proceeding under Title 42, Chapter 14 of the Idaho Code, with respect to each water right, the notice of claim, the director's recommendation, the objection, and any response to the objection, constitute the pleadings. The recommendation as to the elements of the water right contained in a filed director's report constitute *prima facie* evidence, and any person filing an objection to such recommendation has the burden of proof in attempting to rebut the director's recommendation. Idaho Code §42-1411 (5).

An analysis of their objections discloses that Kirby and Doyle have each objected to six items in the director's report: quantity, points of diversion, place of use, consumptive use, remarks, and "other." Not all six objections appear to have been made to each of the five rights, but whenever any of the objections is listed, it appears that the explanation or reason given for the objection is identical each time it is listed. In other words, the written explanation for the quantity objection, or any of the other objections, may not be listed for each of the five rights, but each time any such objection is made, by either Kirby or Doyle,

the explanation or reason given is the same, regardless of the claim number to which it applies. Kirby and Doyle have each prepared a statement of "REASONS FOR OBJECTIONS" for each recommended right objected to and have stated the reasons for boxes 3, 5, 9, 10, 11 and 14. Their statements of "REASONS FOR OBJECTIONS" are contained with their objections and copies are available in the appendix filed with this memorandum.

We will discuss the six reasons given by each of the Jensens in the above order that is, shown in the "REASONS FOR OBJECTIONS" as box 3, box 5, box 9, box 10, box 11, and box 14.

Box 3-Quantity. Both Kirby's and Doyle's objections as to quantity, appear to be that the output of the well on the Kirby Jensen farm, serving as one of the points of diversion for permits nos. 34-07096 and 34-07097, was measured during a 1983 field exam by IDWR at 3.4 CFS, and that figure must therefore limit the full amount for which the two permits can be recommended or licensed. That position, of course, ignores, and is not responsive to the director's recommendation, the IDWR response to the objections, or the most recent supplemental director's report. As IDWR has clearly explained, more than 3.42 CFS, indeed the full authorized amount under the two permits, of 6.12 CFS (3.26 under 07096 and 2.86 under 07097), has been diverted and applied to beneficial use for several years prior to 1987 and ever since, just not all of it from the one well in section 17 on the Kirby Jensen farm. The additional 2.7 CFS (the difference between 6.12 CFS and 3.42 CFS) has been diverted from the well on Mr. Sorensen's mother's farm and applied to beneficial use on the Sorensen Era Flats farm.

It is difficult to understand how this can have any factual or legal impact on the Jensens. Mr. Kirby Jensen has continually pumped the 3.4 CFS (or 3.42 CFS which we

understand to have been the total amount measured in 1983) from the well on his farm for 20 years now, and there appears to be no assertion that more has been needed, or used, or could even have been diverted with the existing equipment from Kirby Jensen's well. If there is either a relevant factual or legal issue raised by this objection, we are unable to see what it is.

Box 5-Points of Diversion. We have no disagreement with the factual statements regarding locations or uses of the wells as contained in either Kirby's or Doyle's objections on this item. Mr. Sorensen did not claim that either the well on Kirby's farm or the well on Doyle's farm is a point of diversion under rights nos. 34-02428 or 34-12416. And, as we understand the supplemental report contained in Mr. Fritschle's October 27, 1997, affidavit, IDWR accepts the fact or circumstance that there is no present physical means for water to be delivered from either the well on Doyle's farm in section 8 or the well on Kirby's farm in section 17 to a facility which would permit it's delivery to the Sorensen farm. Also, as we understand the director's recommendation, the section 17 well on Kirby's farm is recommended only as a point of diversion for rights nos. 34-07096 and 34-07097, and the section 8 well on Doyle's farm is recommended only as a point of diversion for right no. 34-07223. If there ever was either a factual or legal issue under this item, it appears to us that no such issue exists any longer.

Box 9-Place of Use. A review of the objections to place of use as stated in Kirby's and Doyle's objections do not raise either a factual or legal issue. It appears that the October 27, 1997 affidavit of Carter Fritschle and the attached supplemental director's report would eliminate even the concerns (whether legitimate or not) of the Jensens as expressed in their objections.

Box 10-Consumptive Use. While the statements contained in Kirby's and Doyle's objections regarding consumptive use do not appear to raise either factual or legal issues regarding any of the five rights, the 1997 legislature eliminated the requirement for any consumptive use element to be contained in the director's report anyway. See 1997 amendment of Idaho Code §42-1411.

Box 11-Remarks. Both Kirby and Doyle appear to object to what they view as a combining of water rights. As we understand the five rights as recommended, they are indeed used (with other rights) to irrigate a total of 945 acres, 828 on Era Flats, and 117 acres of Mr. Sorensen's mother's land. There are therefore some interrelationships, at least in the sense that point of diversion for some of the rights is identical and the place of use for many of the rights is the same. But there is nothing contained in the objections or the "REASONS FOR OBJECTIONS" of either Kirby or Doyle Jensen, which is factually or legally relevant in the context of the SRBA proceeding.

Box 14-Other. The main concern expressed by Doyle, and one of the main concerns expressed by Kirby, appears to be that somehow right no. 34-07223 would be affected because of its being "combined" with other water rights, or that there is an interdependence between it and the other water rights, or that somehow other water rights are to be diverted from the same well. This concern does not appear to be an accurate reflection of the recommendations of the director's report. Kirby either misunderstands or disagrees that part (2.7 CFS) of the total amount (6.12 CFS) authorized for diversion under permits nos. 34-07096 and 34-07097, has been diverted from a different well than the 3.42 CFS he has historically diverted from the well on his farm. But he has articulated no factual disagreement, and no legal reason for not accepting the recommendations of the Director's report.

CONCLUSION

We urge the court to review the statements of the Jensens given as reasons for their objections. We think such a review will disclose that no material facts are in dispute, and that no relevant legal issues have been raised. So far as their objections to the director's report are concerned, the court should grant summary judgment dismissing those objections.

Respectfully submitted this 26th day of November, 1997.



Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P L L C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

DOCUMENT SERVED: MEMORANDUM IN SUPPORT OF CLAIMANT,
MITCHELL D. SORENSEN'S, MOTION FOR
SUMMARY JUDGMENT

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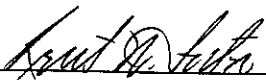
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