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DEPARTMENT OF
WATER RESOURCES

Michael P. Tribe, ISB No. 6816
LING, ROBINSON & WALKER
Attorneys at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

Attorneys for Kevin Smyer

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	)	Subcase No. 45-10481
	)	
Case No. 39576	)	<u>MOTION FOR SUMMARY</u>
	)	<u>JUDGMENT AND SUPPORTING</u>
	)	<u>MEMORANDUM</u>
	)	

COMES NOW Kevin Smyer, the claimant in Water Right No. 45-10481, by and through his attorney of record, Michael P. Tribe, and files this *Motion for Summary Judgment and Supporting Memorandum*. Smyer specifically seeks to have Water Right No. 45-10481 decreed as recommended by the Department of Water Resources. The bases for this *Motion* are set forth as follows:

I. FACTUAL BACKGROUND

On August 19, 1985, Kevin Smyer, Norman Smyer and Delores Smyer purchased a piece of property located in the Albion Valley of Cassia County. The property is more fully described as:

MOTION FOR SUMMARY JUDGMENT

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4 TOWNSHIP 12 SOUTH, RANGE 25 EAST OF THE BOISE
5 MERIDIAN, CASSIA COUNTY IDAHO
6 SECTION 16: NE1/4.

7 The Smyers obtained a warranty deed from the Estate of Kate N. Bridger (see Exhibit "A"
8 attached below and by reference made a part hereof). The deed did not limit the Smyer's interest
9 to any water rights contained on the property. Kate Bridger purchased the property from Albert
10 W. and Wilma Clark in 1967(see Exhibit "B" attached below and by reference made a part
11 hereof).

12 Kevin Smyer filed a notice of claim for a beneficial use surface water right for irrigation
13 in the Snake River Basin Adjudication on May 9, 1989, for Water Right No. 45-10481. The right
14 was later amended and recommended as claimed by the Department of Water Resources. The
15 Department's recommendation for Water Right No. 45-10481 was for .14 cfs with a priority date
16 of March 18, 1910. The Source of the right was a single spring tributary to sinks with a point of
17 diversion at T.12S., R.25E., Sec 16 SWNWNE. The place of use was recommended for T.12S.,
18 R.25E., Sec 16 NWNE (6.8 acres). The place of use and the point of diversion are wholly within
19 land currently owned by Kevin Smyer. The spring, which is the source of the water rights is
20 wholly and entirely within the lands of Smyer and there is no record that Smyer or his
21 predecessors in interest ever allowed a third party to divert the waters of the spring, which would
22 surrender Smyer's interest in the water right. No prior administrative or judicial proceeding has
23 found forfeiture of this right and summary judgment is appropriate in this subcase.
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28 MOTION FOR SUMMARY JUDGMENT

II. STANDARD OF REVIEW

Administrative Order 1 (1)(a) states that the litigation of the SRBA will be governed by the Idaho Rules of Civil Procedure, Idaho Rules of Evidence and the Idaho Appellate Rules. The Snake River Basin Adjudication procedures "supplement the I.R.C.P., I.R.E., I.A.R. and any other applicable laws or orders of this court only to the extent necessary to allow for the fair and expeditious resolution of all claims or issues in the SRBA." A.O.1 (1)(b).

Pursuant to I.R.C.P. 56(c), summary judgment must be entered when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Steele v. Spokesman-Review*, 138 Idaho 249, 251 (2002). "Judgment shall be granted to the moving party if the nonmoving party fails to make a showing sufficient to establish an essential element to the party's case." *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278, 280 (2005). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Id.* However, when an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidence. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785, 787 (2005).

III. WATER RIGHT NO. 45-10481 IS LOCATED OR SITUATED WHOLLY UPON THE LANDS OF KEVIN SMYER

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3 **A. NO THIRD PARTY HAD PERMISSION TO DIVERT WATERS FROM**
4 **SMYER'S SPRING**

5 Idaho Code § 42-212 provides for the diversion of private waters. It states:

6 The department of water resources is hereby prohibited from
7 issuing or granting permits to divert or appropriate the waters of
8 any lake not exceeding five (5) acres in surface area at highwater
9 mark, pond, pool or spring in this state, which is located or situated
10 wholly or entirely upon the lands of a person or corporation, except
11 to the person or corporation owning said land, or with his or its
12 written permission, executed and acknowledged as required for the
13 conveyance of real estate.

14 Neither Smyer nor his predecessors in interest granted written permission allowing a third party
15 to divert or appropriate the water from the spring. (*See attached Affidavit of Kevin Smyer at par*
16 *8.*) No party to the adjudication has come forward to object to Smyer's right based on such a
17 claim. The only objection before this Court is that there has never been a lawful appropriation of
18 the right, which was filed by Earl Warthen. This claim is contrary to the evidence. Smyer first
19 began using the waters of the spring in 1986 to irrigate pasture. (*See attached Affidavit of Kevin*
20 *Smyer at par 5.*) When Smyer purchased the land and begin using the spring water, there existed
21 ditch works running from the spring. (*See attached Affidavit of Kevin Smyer at par 6.*) Smyer
22 has spread water from the spring onto his pastureland whenever there is water available from the
23 spring.

24 In its recommendation for Water Right No. 45-10481, the Department's field agent, Kelly
25 Christensen, stated that during his field investigation on Smyer's property, he found a small pond
26 at the spring location and ditch coming off the pond that ran north. "The pond is visible in 1962
27 aerial photography of the area and based on the location of the ditch and ground contour, it was

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3 determined that 6.8 acres could be irrigated from the system.” *Supplemental Director’s Report*
4 *Regarding SRBA Subcase Nos. 45-10480, 45-10481, etc.* at pg. 8. The combined statements of
5 Kevin Smyer and Christensen are uncontroverted evidence that water has been appropriated from
6 the spring in the past and has been lawfully used by Smyer.

7
8 Warthen cannot as a matter of law establish that the right has been forfeited or abandoned
9 because he has not provided any evidence of abandonment or forfeiture of the right. Therefore,
10 the right should be decreed as recommended because the party asserting that a water right has
11 been forfeited by non-use for a period of five years has the burden of proving the forfeiture by
12 clear and convincing evidence. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944).
13 Warthen cannot meet that burden. Even if the right were found abandoned, Smyer’s resumption
14 of its use would reactivate the with the original recommended date of the Department because no
15 junior user can demonstrate injury.
16

17 **B. IF WATER RIGHT NO. 45-10481 WAS FORFEITED SMYER HAS**
18 **LAWFULLY RESUMED ITS USE**

19 Earl Warthen may or may not be claiming that Water Right No. 45-10481 has been
20 forfeited or abandoned. In his objection, he claimed no lawful appropriation. As discussed
21 above, an unlawful appropriation, forfeiture or abandonment claims fail as a matter of law.
22 There has been no proof offered demonstrating that the right was abandoned, Smyer certainly
23 never intended to abandon the right. Warthen can point to no evidence that Smyer or his
24 predecessors in interest planned to abandon the spring as Smyer’s predecessors in interest have
25 passed on.
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27 If Warthen is alleging forfeiture of the right, the resumption of use doctrine permits

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3 Smyer to validly use the right because permission was never granted to any third parties to enter
4 the property and use the springs as is required by I.C. § 42-212. Smyer put Water Right No. 45-
5 10481 to beneficial use beginning in 1986. In *Sage Willow, Inc. v. Idaho Department of Water*
6 *Resources*, 138 Idaho 831, 70 P.3d 669 2003, the Idaho Supreme Court ruled that:

7 Under the resumption-of-use doctrine, statutory forfeiture is not
8 effective if, after the five-year period of nonuse, use of the water is
9 resumed prior to the claim of right by a third party. A third party
10 has made a claim of right to the water if the third party has either
11 instituted proceedings to declare a forfeiture, or has obtained a
12 valid water right authorizing the use of such water with a priority
13 date prior to the resumption of use, or has used the water pursuant
14 to an existing water right (citations omitted).

15 In the present case, Warthen is not a third party who has a claim of right under any of the criteria
16 articulated in *Sage Willow*. First, Warthen instituted proceedings to declare unlawful
17 appropriation to Water Right No. 45-10481 when he filed his objection on January 3, 2005,
18 which is considerably after Smyer had begun using the waters of the spring. Second, Warthen
19 has not obtained a valid water right authorizing the use of Water Right No. 45-10481 water with
20 a priority date prior to the resumption of use. Warthen could not get such a right without filing
21 and obtaining a permit and license from the Department under I.C. §§ 42-103 and 42-201; no
22 record exists of any attempt by Warthen to obtain such a permit or license for Water Right No.
23 45-10481. Finally, Warthen has not used the water from Smyer's spring pursuant to an existing
24 water right. Warthen could never legally do this because he has never been granted a right to the
25 waters of the spring pursuant to I.C. § 42-212 and could not appropriate the waters without
26 written permission to enter the land and divert the waters of the spring.

27 The resumption of use doctrine is not limited to original owners. *Sagewillow*, 138 Idaho

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3 at 838, 70 P.3d at 676. The Idaho Supreme Court allows for a successor user to apply the
4 resumption of use doctrine to its rights and property and benefit from the original appropriator's
5 priority date.

6 Therefore, even if forfeiture was found for Water Right No. 45-10481, Smyer can
7 lawfully resume that use, as it is wholly on his property and no third party to this litigation has
8 the ability to make a claim to the right without permission to enter the property. No junior user
9 can claim injury because no junior user was able to lawfully use the water of the spring.
10

11 **C. WARTHEN HAS NEVER DISPUTED THE RECOMMENDED PRIORITY**
12 **DATE**

13 Furthermore, Warthen has never disputed the March 18, 1910, recommended priority
14 date. Again, in his objection he has claimed that there was never a lawful appropriation.
15 Warthen cannot now object to the recommended priority date and should be prevented from
16 doing so. Because there is no objection to the recommended priority date, this Court may as a
17 matter of law find that the resumption of the use of the spring extends to the original priority date
18 of March 19, 1910.
19

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21 **IV. CONCLUSION**

22 Based on the above, there is no genuine issue as to any material fact that Smyer is entitled
23 to a judgment as a matter of law that he has lawfully appropriated the spring recommended by the
24 Department in Water Right No. 45-10481 as is entitled to use such water.
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26 The Department is unable to grant Smyer's right to another in the spring that is wholly on
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3 his property without his permission. If the right was forfeited for the statutory period of non-use,
4 Smyer is entitled to resume that use because no party has or is able to claim an interest in the
5 spring prior to his resumption of such use. Therefore, because there are no issues of material
6 fact, the Department's recommendation should be decreed in Water Right No. 45-10481.
7

8 DATED this 21st day of February, 2006.
9

10 LING, ROBINSON & WALKER

11 By: Michael P. Tribe
12 Michael P. Tribe
13 Attorneys for Kevin Smyer
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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of February, 2006, I served the original and true and correct copies, respectively, of the foregoing MOTION FOR SUMMARY JUDGMENT upon:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Copies to:

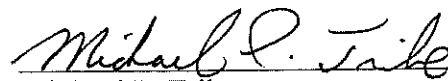
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Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, Idaho 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

Rochelle M. Davis, Esq.
Barker Rosholt & Simpson, LLP
P. O. Box 2139
Boise, ID 83701-2139
Attorneys for Earl Warthen

by depositing said document in the United States mail, postage prepaid, in envelopes addressed to said persons/entities at the foregoing addresses.


Michael P. Tribe

172518

MAR 30 1993

WARRANTY DEED

Department of Water Resources
Southern Region Office

THIS INDENTURE, made this 19 day of August, 1985,
between CLYDE L. GOODMAN, Personal Representative of the ESTATE
OF KATE N. BRIDGER, a/k/a KATE BRIDGER, hereinafter called the
"Grantor", and NORMAN SMYER and DeLORES SMYER, husband and wife,
and KEVIN SMYER, a single man, whose address is Route 1 - Box 2,
Declo, Idaho 83323, hereinafter called the "Grantee".

W I T N E S S E T H:

That the Grantor for and in consideration of the sum of
Ten Dollars (\$10.00), lawful money of the United States of America
and other good and valuable consideration, to the Grantor in hand
paid by the Grantee, the receipt whereof is hereby acknowledged,
has granted, bargained and sold and by these presents does grant,
bargain and sell, convey and confirm unto the Grantee, and to the
heirs and assigns of Grantee, forever, all of the following
described real estate situated in the County of Cassia, State of
Idaho, to-wit:

TOWNSHIP 12 SOUTH, RANGE 25 EAST OF THE BOISE
MERIDIAN, CASSIA COUNTY IDAHO
Section 16: NE $\frac{1}{4}$.

SUBJECT TO:
Accruing taxes, levies and assessments.

TOGETHER with all and singular the tenements, heredita-
ments and appurtenances thereunto belonging or in anywise apper-
taining, the reversion and reversions, remainder and remainders,
rents, issues and profits thereof, and all estate, right, title
and interest in and to the said property as well in law as in

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OCT 27 1994

PARSONS, SMITH, STONE & FLETCHER
LAWYERS
BURLEY, IDAHO

equity of the Grantor.

TO HAVE AND TO HOLD, all and singular the above-mentioned and described premises, together with appurtenances unto the Grantee and to the heirs and assigns of Grantee forever.

The Grantor shall and will warrant and by these presents will forever defend the said premises in the quiet and peaceable possession of the Grantee, and the heirs and assigns of the Grantee against all and every person and persons whomsoever lawfully claiming the same, except as aforesaid.

Letters Testamentary were recorded in the office of the County Recorder of the County of Cassia, State of Idaho, on the 7th day of May, 1985, as Instrument number 169203, on film 172, records of Cassia County, Idaho.

IN WITNESS WHEREOF, the Grantor has executed this Deed the day and year first above written.

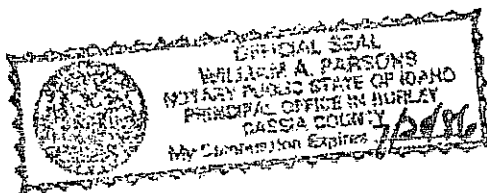
ESTATE OF KATE N. BRIDGER, a/k/a
KATE BRIDGER

BY Clyde L. Goodman
Clyde L. Goodman
Personal Representative

STATE OF IDAHO)
County of CASSIA) ss

On this 19 day of August, in the year of 1985, before me, the undersigned, a Notary Public in and for said State, personally appeared CLYDE L. GOODMAN, known or identified to me be the person whose name is subscribed to the within instrument Personal Representative of Estate of Kate Bridger, and acknowledged to me that he executed the same as such Personal Representative.

William A. Parsons
Notary Public for Idaho
Residing at Burley, Idaho



Revenue Stamps

EXHIBIT

106852

WARRANTY DEED

FOR VALUE RECEIVED, to-wit: 1.10.00 and other valuable consideration,

ALBERT W. CLARK and WILMA CLARK, husband and wife,

the grantor(s) hereby grant, bargain, sell and convey unto

KATE BRIDGER, widow,
Box 36, Albion, Idaho 83711the grantee the following described premises, in Cassia County, Idaho, to-wit:Northeast Quarter (NE $\frac{1}{4}$) of Section Sixteen (16),
Township Twelve (12) South, Range Twenty-five (25)
East Boise Meridian.

RECORDED AT THE REQUEST OF
KATE BRIDGER
FILM 116
APR 20 1 18 PM '78
CASSIA COUNTY, IDAHO
FRANK R. JENSEN
RECORDER
J. E. X. J. G.

106852

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee
her heirs and assigns forever. And the said Grantors do hereby covenant to and with the
said Grantee that they are the owners in fee simple of said premises; that they are free from all in-
cumbrances, excepting as set out above, and that they will warrant and defend the same from all lawful
claims whatsoever.

Witness our hands this 17th of March 1967

Albert W. Clark

Wilma Clark

STATE OF IDAHO, COUNTY OF Cassia

On this 20th day of March 1967,
before me, a notary public in and for said State, personally
appeared ALBERT W. CLARK and
WILMA CLARK,

known to me to be the persons whose names are
subscribed to the within instrument, and acknowledged to
me that they executed the same.

Betty Wadsworth
Notary Public

Residing at Burley, Idaho
Comm Expires 2-26-71

STATE OF IDAHO, COUNTY OF

I hereby certify that this instrument was filed for

record at the request of

at minutes pasto'clock on19 day of

in my office, and duly recorded in Book

B of Deeds at page

Ex-Officio Recorder

By _____ Deputy.

Fees \$

Mail to:

INSTRUMENT NO.

EXHIBIT