

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID J. BARBER (ISB #2597)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690

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MAY 19 2006
Department of Water Resources
Adjudication Bureau

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. 31-11845
	)	
	)	
	)	
Case No. 39576	)	BRIEF IN OPPOSITION TO MOTION FOR
	)	SUMMARY JUDGMENT
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general, responds to the *Motion for Summary Judgment* and supporting papers filed by the claimant by filing this *Brief in Opposition to Motion for Summary Judgment, Affidavit of Carter Fritschle Dated May 19, 2006, and State of Idaho's Exhibit List.*

COPY

I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

This controversy relates to the amount of beneficial use that occurred under the original licensed water right no. 31-07311 for use on lands described in Condition #6 of the Conditions of Approval and Remarks as “663 acres of uncultivated pasture located in sections 15, 16, 21, and 22 of Township 7 North, Range 34 East, B. M.”

ii. Course of the Proceedings

Four water rights have common points of diversion. The places of use overlap for water right nos. 31-02357 and 31-07311; the places of use overlap for water right nos. 31-02395 and 31-11845. Exhibit 22, water right license no. 31-02357; Exhibit 2, water right license no. 31-07311; Exhibit 21, water right license no. 31-02395. A brief description of water right nos. 31-02395 and 31-07311 assists in understanding the relationship between the relevant water rights.

The State Reclamation Engineer issued on March 14, 1968 water right license no. 31-2395 (originally designated as G-30241) to David R. Jernberg for irrigation of 324 acres within sections 15, 16, and 21 of Township 7 North, Range 34 East, B.M. The priority date for license no. 31-2395 is October 9, 1961. The Snake River Basin District Court (“SRBA District Court”) entered its partial decree for water right no. 31-2395 on February 22, 2002. The place of use was described as follows:

T 07N R 34E S 15	NWNW	1.0	SWNW	37.0
	SEnw	40.0	NESW	40.0
	NWSW	40.0	SWSW	40.0
	SESW	40.0		
S 16	NENE	1.3	SWNE	3.6
	SENE	40.0	NESE	40.0
	NWSE	25.0	SWSE	36.0
	SESE	40.0		
S 21	NENE	40.0	NWNE	28.0
	SWNE	20.0	SENE	40.0

S 22	NWNW	41.0	SWNW	40.0
	SENW	40.0		

The State Reclamation Engineer issued on September 5, 1997 water right license No. 31-07311 to David R. Jernberg for irrigation of 461 acres within sections 9, 10, 15, and 16 of Township 7 North, Range 34 East, B.M. The priority date for license no. 31-07311 is April 23, 1979. The SRBA District Court entered its partial decree for water right no. 31-07311 on February 22, 2002. The place of use was described as follows:

T 07N R 34E S 09	NESE	33.0	SWSE	27.0
	SESE	26.0		
S 10	NWSW	4.0	SWSW	28.0
S 15	NWNW	39.0	SWNW	5.0
S 16	NENE	39.0	NWNE	40.0
	SWNE	34.0	NENW	40.0
	NWNW	39.0	SWNW	38.0
	SENW	34.0	NWSW	20.0
	NWSE	15.0		

Water right license no. 31-07311 included nine conditions of approval, and the fifth, sixth, and eighth conditions of approval stated as follows:

5. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre for irrigation of the lands above.
6. Water diverted under this right, and an additional 4.99 cfs of ground water diverted from the points of diversion described above, may also be diverted onto 663 acres of uncultivated pasture located in Sections 15, 16, 21 and 22 of Township 7 North, Range 34 East, B.M., but this additional use is not an appurtenance of the land upon which it occurs.
- ...
8. Rights 31-02357 and 31-02395 are also diverted from the points of diversion described above.

Exhibit 2, Water Right License No. 31-07311. The partial decree entered on February 22, 2002 included the sixth condition stated above and a combined annual diversion volume of 1,613.5 AF for water right nos. 31-02357 and 31-07311.

The District Court received a letter from claimant Ben Jernberg (“claimant”) that disagreed with some of the elements in the decreed elements of water right nos. 31-02357, 31-02395, and 31-07311. The District Court responded to this letter by entering an *Order of Reference to Special Master Brigitte Bilyeu*.

The claimant then filed a *Motion to Set Aside and Vacate the Partial Decree and to Allow the Filing of a Late Objection* with regard to water right no. 31-07311.

Special Master Bilyeu entered a *Special Master’s Order Recommending Partial Decree Be Set Aside*. Thereafter, the District Court entered its *Order Dismissing Motion to Set Aside Partial Decrees and Setting Aside Partial Decree and Issuing Partial Decree* on March 15, 2004. The practical effect of this order was to delete the sixth license condition from the partial decree for water right no. 31-07311 and to require that the use of water under the sixth license condition be reported under new claim number no. 31-11845.

The Idaho Department of Water Resources, (“IDWR”), issued its *Director’s Report for Late Claims*, which described the water right, in part, as follows:

QUANTITY: 4.990 CFS

Right nos. 31-2395 and 31-11845 are limited to a total combined diversion rate of 6.48 cfs and to a total combined annual diversion volume of 1134 AF.

PLACE OF USE: IRRIGATION Within JEFFERSON County

T 07N R 34E S 15	NWNW	1.00	SWNW	37.00
	SENW	40.00	NESW	40.00
	NWSW	40.00	SWSW	40.00
	SESW	40.00		
T 07N R 34E S 16	NENE	1.30	SWNE	3.60
	SENE	40.00	NESE	40.00
	NWSE	25.00	SWSE	36.00
	SESE	40.00		
T 07N R 34E S 21	NENE	40.00	NWNE	28.00
	SWNE	20.00	SENE	40.00

T 07N R 34E S 22	NWNW	41.00	SWNW	40.00
	SEnw	40.00		

672.9 ACRES TOTAL

Right nos. 31-2395 and 31-11845 are limited to the irrigation of a combined total of 324 acres in a single irrigation season.

The claimant filed an objection to the recommendation for claim no. 31-11845. The claimant requested that the quantity be increased to 8.83 cfs and that the total acreage of the place of use be increased to 658 acres.

The claimant sold the real property in question to Idaho Properties, LLC, and IDWR issued a *Notice of Completed Administrative Proceeding* on February 13, 2006.¹

The District Court entered an *Order Granting Motion Requesting Additional Time and Second Amended Trial Schedule* on April 5, 2006.

The claimant filed a *Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment* (hereinafter referred to as "Claimant's Memorandum"), and other supporting papers on April 28, 2006. The Claimant's Memorandum described the elements to be decreed as follows:

Water Right No. 31-11845 should be decreed, at a minimum, for 4.99 cfs of ground water with a priority date of April 23, 1979. The recommendation of 4.99 cfs is a remnant from the original license for Water Right No. 31-7311; in addition, the place of use should be for 663 acres rather than the recommended total of 324 acres within a place of use of 672.9 acres. As required by Idaho law, Jernberg has put 4.99 cfs to beneficial use since he made application for Water Right No. 31-7311. Because Jernberg has used his requested rate of diversion, he is entitled to a decree that gives him the diversion rate normally decreed for water rights in Idaho.

Claimant's Memorandum, at 2.

¹ The brief will refer to the claimant under water right claim no. 31-11845 simply as the "claimant," unless the context requires a more specific reference either to Mr. Jernberg or Idaho Properties, LLC.

iii. Statement of Facts

IDWR struggled with the licensing of water right no. 31-7311, the parent water right for water right 31-11845. Field examiner, John Arambarri, in a memo dated August 22, 1986 concluded: "It was obvious that the pasture needs and receives less acre feet per annum than the grain crop, and I recommend that the licensing volume be reduced accordingly for the pasture land." Exhibit 4: Memo dated August 22, 1986. Ultimately, IDWR rather than placing a specific volumetric limitation on water right no. 31-11845 chose to include Condition 6 in the license as a means for representing the extent of beneficial use that existed.

A field inspection of the place use for water right no. 31-11845 was made on May 15, 2006. The following persons attended: Ben Jernberg, Diehl Gross, Bryce Contor, Michael P. Tribe, David J. Barber, Carter Fritschle, and Candice McHugh. Mr. Carter Fritschle took photos of the place of use and prepared a map of the place use. The location map and some of those photos were attached to his affidavit. *Affidavit of Carter Fritschle Dated May 19, 2006.*

II. ISSUES PRESENTED

The primary issue for determination is the extent of beneficial use on the 663 acres of uncultivated land that is the designated place of use of claim no. 31-11845.

III. SUMMARY OF THE ARGUMENT

Disputed issues of fact preclude entry of summary judgment.

IV. ARGUMENT

A. Standard of Review for Summary Judgment.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions of records show that there was no genuine issue of material fact. In making that determination of whether an issue of material fact exists, all disputed facts are liberally construed in favor of the non-moving party and all reasonable inferences that can be drawn from the record

are drawn in favor of the non-moving party. *Garner v. Bartshi*, 139 Idaho 430, 432 80 P.3d 1031, 1034 (2003). Substantive law defines as material those factual disputes that affect the outcome. Disputes about irrelevant matters do not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. The Determination of the Duty of Water is a factual determination that may vary within a geographic area.

Idaho courts struggled with the difficult determination of the duty of water for irrigation in our arid climate.² The water rights of the Boise River were adjudicated in a proceeding that resulted in entry of a decree known as the “Stewart Decree,” which was named for the district court judge presiding over the adjudication. The Idaho Supreme Court affirmed the District Court’s judgment on appeal. *Farmer’s Co-operative Ditch Co. v. Riverside Irrigation Dist. et al.*, 14 Idaho 450 (1908). Upon remand, some of the defendants filed a motion for a new trial. They appealed after a denial of the motion. The Idaho Supreme Court affirmed in part, and reversed in part. The Court remanded the issue of duty of water for a new trial and stated:

‘In this arid country the largest duty of and the greatest use must be had from every inch of water in the interest of agriculture and home building.’ After a somewhat extended and very careful examination of the record in this case, we are convinced that justice demands and the record justifies the granting of a new trial to the extent and for the purpose of determining the duty of water on the two classes of lands mentioned in this decree.

Farmer’s Co-operative Ditch Co. v. Riverside Irrigation Dist. et al., 16 Idaho 525, 527 (1909), quoting *Van Camp v. Emery*, 13 Idaho 202, 208 (1907).

Using different duties of water for different types of uses of water within a geographic area is not new to Idaho. The Ninth Circuit, Circuit Court of Appeals, affirmed a trial court decision to

² The phrase “duty of water” in the context of irrigated agriculture means the amount of water that is necessary for the reasonable irrigation of the designated place of use for a particular water right.

do that in *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th C.C.A. 1917). The Court stated:

The trial court, however, in its opinion, indicated that a prior right should be recognized in the defendant for the irrigation of 3,000 acres of hay land and 2,500 acres of pasture, aggregating 5,500 acres. Its basis for the duty of water was approximately 3 acre-feet for hay and grain land and 1½ acre-feet for pasture.

Id. 245 F. at 12.

Thus, the duty of water is a factual determination that may vary by the type of use and class of land where the water is applied.

C. Disputed Issues of Fact Preclude Entry of Summary Judgment in this Matter.

The concept of beneficial use of water is recognized in the Idaho Constitution and permeates Idaho law. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 743 (1997). Various elements of a water right describe its beneficial use. Here, only some of those elements are in dispute. The Director's Recommendation includes a gross place of use of 672.9 acres for water right no. 31-11845 and a net place of use of 324 acres. The claimant in his objection requests a gross place of use of 663 acres and a net place of use of 658 acres. Claimant's Memorandum, at 2. The Director's Recommendation did not include a volumetric duty of water, but because of the unique facts of the irrigation of uncultivated pasture chose to recommend a net acreage limitation as a means of quantifying the extent of beneficial use. The claimant objects to the Director's recommendation of the acreage limitation and instead requests this court to decree a duty of water for the uncultivated pasture of 3.5 acre feet per annum, which is the same duty applicable to row crop land in this geographic area.

A full water supply for 663 acres would be the total volume of 2,320.5 acre-feet per annum, which is the product of 663 acres and the 3.5 acre feet per acre duty of water. Since portions of this same place of use receive water from water right no. 31-02395, a combined use limitation would

have to describe both water rights as being limited to the total volume of 2,320.5 acre feet. The Director did not recommend a combined use limitation of 2,320.5 acre-feet for water right nos. 31-02395 and 31-11845, and the State of Idaho has not agreed to a combined use limitation of 2,320.5 acre feet.³ This disagreement with the claimant over the actual amount of beneficial use is the primary factual dispute.

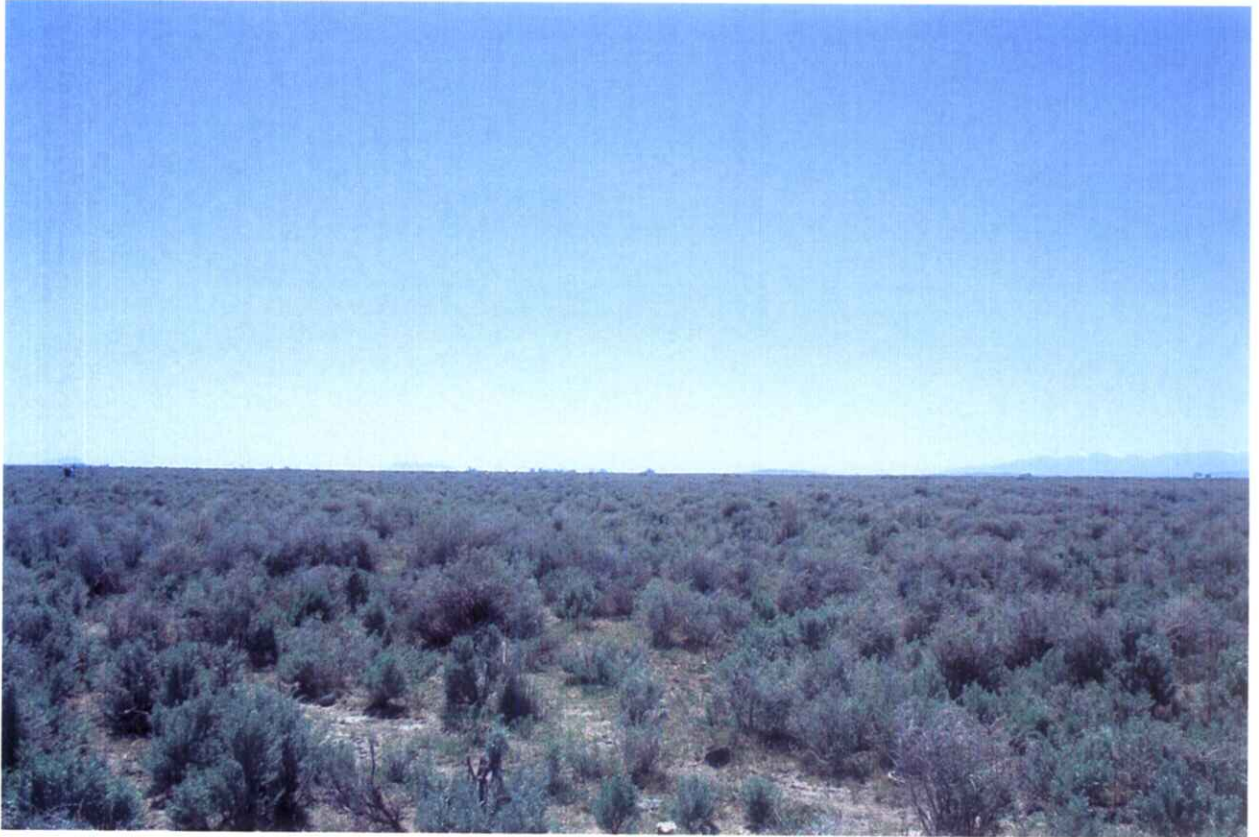
The State of Idaho conducted a field inspection of the claimant's property on May 15, 2006. Large expanses of brush were broken up by lower areas with less brush. *Affidavit of Carter Fritschle dated May 18, 2006*. Native grasses were found among the brush. Exhibit 11: Photo 3; Exhibit 12: Photo 4; Exhibit 13: Photo 5. Much of this brush exceeded eighteen inches in height; brush was the predominant vegetative cover. Exhibit 13: Photo 5; Exhibit 16: Photo 11. Ditches crossed the property. Exhibit 17: Photo 13; Exhibit 18: Photo 18. The present day condition of the ditches is one of some disrepair. Exhibit 19: Photo 19. What is the appropriate duty of water for this land? The Ninth Circuit, Circuit Court of Appeals, described the method of analysis as follows:

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect and indolence in the preparation of their lands for the successful application of the water. One farmer, although he has a superior water right, should not be allowed to waste water in the irrigation of his land to supply both him and his neighbor, simply because his land is not adequately prepared for the economical application water.

245 F. at 22 (quoting *Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 535-536 (1909)). IDWR concluded that a full duty of water of 3.5 acre feet per acre was

³ There are other ways to describe this limitation other than a combined use limitation. Water right no. 31-02395 was originally limited to a specific 324 acre tract of land with an annual volume of 1,134 acre-feet per annum. Water right no. 31-02395 was described with more flexibility in the SRBA as being 324 acres within 663 acres with an annual volume of 1,134 acre feet. Here the difference between the gross place of use of 663 acres and the 324 acres of use under water right no. 31-02395 is 339 acres. An alternative method of describing claim no. 31-11845 would be 339 acres within 663 acres with an annual volume of 1,186.5 acre-feet. Neither IDWR nor the State of Idaho have agreed to this annual volume for the 339 acres.

unwarranted because the claimant never demonstrated beneficial use of that amount of water on that land. Rather, water was simply being applied to enhance sporadic native grasses. The concern about the amount of beneficial use on the uncultivated pasture is evident in the pictures from the recent field investigation. Exhibit 14, Photo 6, illustrates the place of use for which the claimant requests a full water right. Exhibit 14, Photo 6, is duplicated below.



This is not rocket science. It is difficult to justify agreeing with the position of the claimant that this brush covered land is entitled to a full water right duty of 3.5 acre feet.

Such requests for a full irrigation water right for brush covered land has been before courts in the State of Idaho before. In *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th C.C.A. 1917) the Court reached the following conclusion about such a request to irrigate such land:

In the meantime, from 1904 up to the date of plaintiffs' appropriation, no attempt had been made to reduce the sagebrush land under the ditch to cultivation, although the water had been thrown out upon it for the purpose of producing in greater abundance the native grasses found among the sagebrush. The grasses there found were scanty and sparse; nor did irrigation serve largely to promote their growth. The employment of water for this purpose can scarcely, in this day of agricultural progress in the arid states, be classed as a beneficial use.

245 F. at 21-22. Thus, the Court completely rejected this use of water here. The State of Idaho is not requesting complete rejection of the claim here; but rather, a reduced duty of water consistent with the limited beneficial use that is occurring. In addition, recognition that water has not been beneficially use on the entire 672.9 acres is also appropriate.

Ultimately, it is claimant's duty to prove each element of its water right to the District Court, including an appropriate duty of water for the land in question. IDWR has determined that a full duty of water is not warranted. *Affidavit of Carter Fritschle Dated May 19, 2006*, at 4. Given the factual dispute regarding the appropriate duty of water, this matter is not appropriate for summary judgment.

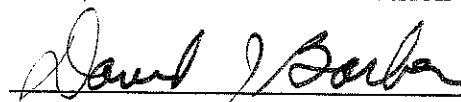
V. CONCLUSION

The primary factual dispute in this case remains: What is the extent of the beneficial use developed under claim no. 31-11845? Or, stated another way, what duty of water do you apply to claimant's land? Given these factual disputes summary judgment must be denied.

RESPECTFULLY SUBMITTED this 19th day of May 2006.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF MAILING

I certify that on this 19th day of May, 2006, I caused to be served the original and copies of this BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT on the following persons by the indicated methods:

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

2. Copies to the following persons:

Roger D. Ling
Michael P. Tribe
LING, ROBINSON & WALKER
Attorneys at Law
615 H Street
P.O. Box 396
Rupert, ID 83350
U. S. MAIL

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098
STATEHOUSE
MAIL

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
U. S. MAIL

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449
(not applicable)



DAVID J. BARBER
Deputy Attorney General