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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

In Re SRBA	)	ORDER ON SUMMARY JUDGMENT
	)	
Case No. 39576	)	SUBCASE NO.: 31-11845
	)	
_____	)	

I. PROCEDURAL BACKGROUND

A *Director's Report* for this subcase was filed by the Idaho Department of Water Resources (IDWR) on May 10, 2001. The water use now claimed under subcase 31- 11845 was originally claimed under water right number 31-7311. IDWR filed a *Director's Report* for 31-7311, and no Objections were filed. Therefore, the SRBA court issued a ***Partial Decree*** for 31-7311 as recommended in the *Director's Report*. The elements in the ***Partial Decree*** included quantity of 4.62 cfs of water to irrigate 461 acres of cultivated pasture. The elements of the ***Partial Decree*** did not include the quantity of water or acreage claimed for the uncultivated pasture. The uncultivated pasture grass was addressed in the "other provisions necessary" clause. It read:

Water diverted under this right, and an additional 4.00 cfs of ground water diverted from the points of diversion described above may also be diverted onto 663 acres of uncultivated pasture located in T07N, R34E, Sections 15, 16, 21, and 22, but this additional use is not an appurtenance of the land upon which it occurs.

The ***Partial Decree*** was not appealed. However, in April 15, 2003, the claimant Ben Jernberg¹ sent a letter to the SRBA Court indicating he disagreed with the decree. Mr. Jernberg then filed a *Motion to Set Aside and Vacate Partial Decree and to Allow the Filing of a Late Objection*.

¹ Idaho Properties LLC succeeded Ben Jernberg as the claimant to this water right. Mr. Jernberg remains as the objector.

This Special Master issued an *Order Recommending Partial Decree Be Set Aside*. (hereafter "Order") Included in the *Order* were findings that IDWR did not include the uncultivated land in the elements of the license for 31-7311 or in the elements of its recommendation because it concluded there was insufficient proof of use of water on the uncultivated land. IDWR referred to the uncultivated land in the "other provisions necessary" section to allow use of water on the uncultivated land. The *Order* held the "other provisions necessary" language was ambiguous "because it is unclear whether that language defines a vested water right or not." The *Order* explained that IDWR's intent was to allow use of water on the uncultivated land, but not to recognize that use as a vested water right. The *Order* found that it would be "inappropriate to alter the *Partial Decree* to make the water use on the uncultivated land appurtenant to the land on which it is used, since it was not recommended in the *Director's Report* in that manner." *Order* at 7. The *Order* determined that a new subcase should be opened based on the existing claim for the uncultivated land, and that the claimant could try to prove whether a valid water right existed.

The portion of the claim relating to the uncultivated pasture was assigned number 31-11845. IDWR filed a *Director's Report* on April 22, 2005. The *Director's Report* recommended the uncultivated pasture with quantity of 4.99 cfs on 672.9 acres. Claimant Ben Jernberg filed an *Objection*. The State of Idaho filed a *Response*.

On April 28, 2006, the Claimant Idaho Properties, LLC and Objector Ben Jernberg filed a *Motion for Summary Judgment*.

II. STANDARD OF REVIEW

I.R.C.P. 56 provides for summary judgment where there is no genuine issue as to any material fact. The Idaho Supreme Court concludes that summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions on record show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. In making a 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 P3d 1031, 1034 (2003)

III. ANALYSIS

The movants assert there is no genuine issue of material fact as to acreage and quantity, and ask that a partial decree be issued. Specifically, movants assert that the claimant is entitled, as a matter of law, to a partial decree with quantity of 4.99 cfs on 663 acres of uncultivated pasture grass.

Movants base their argument largely on two documents previously issued by IDWR. First, movants assert that IDWR is bound to the findings in the license for 31-7311. Movants argue that they are entitled to findings as a matter of law on acreage and quantity because IDWR previously licensed this right to irrigate the 663 acres with 4.99 cfs. Second, movants assert that IDWR is bound by the “conclusions” of a 1986 field exam.

This Special Master disagrees. The license for 31-7311 did not determine any elements for the uncultivated pasture grass. The language contained in the license which described the uncultivated pasture grass was carried over to the *Partial Decree*, and is exactly what the claimant asked the court to set aside. As to the 1986 field exam, it is evidence, but it does not circumvent the need to weigh other evidence in this case. The record contains genuine issues of material fact requiring a trial.

A. The Prior License

The movant Mr. Jernberg previously moved the court to set aside the *Partial Decree* for 31-7311 which was based on a license. Mr. Jernberg took issue with the *Partial Decree* and license because they did not include water use on the uncultivated pasture in the elements for 31-7311. The reference to the uncultivated pasture grass is the language claimant asked the court to set aside. This Special Master has already ruled on the effect of the language in the license and *Partial Decree* which referred to the uncultivated pasture. The licensed language carried over to the *Partial Decree* was deleted from the *Partial Decree* and the elements of 31-7311 were then decreed. This subcase allows the claimant to try to prove that use. The license for 31-7311 is not sufficient to prove the elements of this water right as a matter of law.

B. The 1986 Field Exam

The movants assert that a field exam conducted in 1986 supports this *Motion for Summary Judgment*. In the process of licensing water right 31-7311, IDWR conducted a field exam, and agent John Arambarri prepared a *Beneficial Use Field Report* (August 21, 1986);

Affidavit of Michael Tribe, Exhibit A. The report included measurements, diagrams, maps, and illustrations. In one illustration, agent Arambarri clearly drew the grain crop and the uncultivated pasture making clear that the two were distinct. Furthermore, Agent Arambarri explained the significance of the two water uses in a memo to the IDWR file dated August 22, 1986. *See, Supplemental Director's Report*; Attachment A. In the memo, Agent Arambarri noted, "Two distinctively different irrigation uses were found." He further concluded that "It was obvious that the pasture needs and receives less acre feet per annum than the grain crop, and I recommend the licensing volume be reduced accordingly for the pasture land." Thus, much of the 1986 field exam and report support the conclusions in the *Supplemental Director's Report*,

Although the 1986 field exam contains information that may be helpful to the movants' position on acreage and quantity, it is insufficient to support a finding on summary judgment.

C. The Director's Report

The Idaho Department of Water Resources issued a *Director's Report for Late Claims* describing this water right with quantity of 4.99 cfs and a combined use limitations and volume limitation. The Place of Use was recommended with 672.9 acres total and a combined acreage limitation. A *Director's Report* in the SRBA is entitled to *prima facie* weight and further indicates that genuine issues of material fact remain.

D. The Affidavits

Two affidavits were submitted in conjunction with the *Motion for Summary Judgment*. The affidavits underscore the existence of genuine issues of material fact. On the one hand the *Affidavit of Bryce A. Contor in Support of Motion for Summary Judgment* (hereafter "*Affidavit of Contor*") asserts that about 663 acres have been irrigated. The affidavit also indicates "That the 1986 field exam found a similar number of acres to my analysis of 1987 aerial photos and found similar pumping rates to my 2004 measurements." The *Affidavit of Contor* concludes that "Your affiant has found nothing that would contradict IDWR's 1986 finding that Mr. Jernberg was irrigating 1124 acres."

On the other hand, the *Affidavit of Carter Fritschle Dated May 19, 2006* (hereafter "*Affidavit of Fritschle*") asserts that 324 acres of uncultivated pasture grass are irrigated based on a June 26, 1987 NAPP photograph. The *Affidavit of Fritschle* also asserts that the Contor estimate of 663 acres included land not owned by the movants. After deleting this non-owned

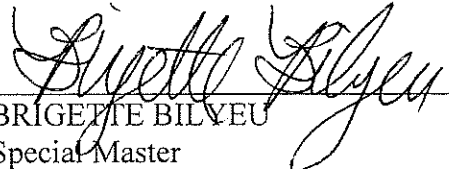
land, Fritschle concludes that the maximum number of acres shown in the 1987 aerial photograph is 493.7 acres *Affidavit of Fritschle* at 5. These two affidavits are in conflict as to the acreage, showing genuine issues of material fact remain.

IV. CONCLUSION

The prior license for 31-7311 does not support findings as a matter of law on the uncultivated pasture grass. The 1986 field exam is evidence which may be helpful to the movants, but it does not show the absence of genuine issue of material fact. Similarly, the two affidavits support conflicting findings on acreage. The *Affidavit of Contor* concludes that about 663 acres of uncultivated pasture grass is irrigated. The *Affidavit of Fritschle* concludes that 324 acres of uncultivated pasture grass is irrigated. These affidavits clearly illustrate that genuine issues of material fact exist. Thus, this case is inappropriate for summary judgment.

THEREFORE, the *Motion for Summary Judgment* is **denied**.

Dated: June 30, 2006.


BRIGETTE BILVEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on June 30, 2006, with sufficient first-class postage to the following:

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