

Jeanette Wolfley, ISB #3948
Wolfley Law Office
202 North Arthur
Pocatello, ID 83204
Telephone: (208) 232-1922
Facsimile: (208) 232-7472
Email: wolfleyj@ida.net

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JAN 14 2008

DEPARTMENT OF
WATER RESOURCES

Attorney for Shoshone-Bannock Tribes

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. 27-00016C
	)	
Case No. 39576	)	SHOSHONE-BANNOCK TRIBES'
	)	MEMORANDUM IN SUPPORT OF MOTION
	)	FOR SUMMARY JUDGMENT
_____	)	

INTRODUCTION

Pursuant to Rule 56, I.R.C.P., the Shoshone-Bannock Tribes, by and through their attorney, Jeanette Wolfley, file this Memorandum of Law in Support of their Motion for Summary Judgment of Dismissal, and respectfully request this Court to modify and/or dismiss the claim filed by Marion Walker.

On May 2, 1989, Marion Walker filed his water right claim seeking a water right which includes lands located on the Fort Hall Reservation. On March 13, 2006, the Shoshone-Bannock Tribes filed an objection to this claim.

As will be demonstrated herein, there is no genuine issue of material fact that would prevent this Court from issuing the requested summary judgment pursuant to Rule 56, I.R.C.P., and modifying and/or dismissing the Walker claim. The Shoshone-Bannock Tribes are entitled

to this relief as a matter of law. We rely on the decisions, the record and this memorandum, and respectfully request that summary judgment be granted.

STATEMENT OF UNDISPUTED FACTS

1. The Fort Hall Reservation ("Reservation") is the home of the Shoshone and Bannock Tribes.
2. On June 14, 1867, a Presidential Executive Order designated the Reservation for various Boise and Bruneau Bands of Shoshone who occupied the area from time immemorial.¹
3. On July 3, 1868, the Eastern Shoshone and Bannock Tribes concluded the Second Treaty of Fort Bridger.² By Article 2 of the Treaty, the United States guaranteed the creation of separate reservations for the exclusive use and occupancy of the signatory tribes.
4. Pursuant to this guarantee, and the Executive Order of 1869³, the Fort Hall Reservation was established as a "permanent home" for the Shoshone and Bannock Tribes' exclusive use and benefit. The Shoshone-Bannock Tribes are successors in interest to the signatories of the Treaty.
5. In 1964 the Army Corps of Engineers completed a local flood protection project on the Blackfoot River authorized under section 204 of the Flood Control Act of 1950. The project consisted of building levees, replacing irrigation diversion structures, replacing bridges, and channel realignment. The channel realignment portion of the project relocated segments of the Blackfoot River's bed and banks entirely within the boundaries of the Fort Hall Reservation, and lands of the Reservation onto the northern side of the Blackfoot River.

¹ Executive Order by President Andrew Johnson, 1 Kappler 835 (June 14, 1867).

² Treaty with the Eastern Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, 2 Kappler 1020.

³ Executive Order by President Ulysses S. Grant, 1 Kappler 76 (July 30, 1869). President Grant's 1869 Executive Order designated the same lands set aside for the Boise-Bruneau Bands under the 1867 Executive Order as the reservation secured by the Bannocks and Mixed Bands of Shoshone and Bannocks by Article 2 of the 1868 Treaty.

6. The Department of Interior, Bureau of Land Management, Cadastral Survey Office conducted surveys of the Blackfoot River in 1999 through 2003, and has prepared plats representing the surveys that show the present course of the Blackfoot River and identify the Fort Hall Reservation borders that existed at the time the Reservation was established. *See* 67 Fed. Reg. 46,686 (July 16, 2002); 67 Fed. Reg. 64,656 (October 21, 2002); 68 Fed. Reg. 17,072 (April 8, 2003); 69 Fed. Reg. 2,157 (January 14, 2004); 70 Fed. Reg. 3,382 (January 24, 2005). BLM Survey map of the area is attached hereto and incorporated herein as Exhibit 1.

7. The survey maps of the Blackfoot River show numerous parcels of Reservation land are located north of the present Blackfoot River channel. Based on the surveys, Exhibit 1, and land description set forth in the Idaho Department Water Resources Director's Report, Marion Walker's place of use is partially on Tribally or individually owned Indian lands. Frederick A. Hernandez, attached hereto and incorporated herein as Exhibit 2. Marion Walker's is cultivating Reservation lands and using water from the Blackfoot River. Exhibit 2.

ARGUMENT

CLAIMANT IS NOT ENTITLED TO A PLACE OF USE WATER RIGHT FOR LANDS LOCATED ON THE FORT HALL RESERVATION

A. The Rule 56(b) Summary Judgment Standard

The standard for issuing summary judgment is well-settled. The party seeking summary judgment under Rule 56, I.R.C.P., must show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Podolan v. Idaho Legal Aid Services*, 123 Idaho 937, 941-42, 854 P.2d 280, 284-85 (Ct. App. 1993); *First Security Bank v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). All evidence and inferences must be viewed in light most favorable to the non-moving party. *United States v. State*, 135 Idaho 655, 660, 23 P.3d 117, 122 (2001).

To withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 363 (1969). A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Id.* The party opposing the motion may not merely rest on the allegations contained in the pleadings, rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. *Worthen v. State*, 96 Idaho 175, 176, 525 p.2d 957, 958 (1974).

Summary judgment dismissing a claim is appropriate when the plaintiff fails to submit evidence to establish an essential element of the claim. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988), citing *Celotex v. Catrett*, 477 U.S. 317 (1986). "In such a situation, there can be 'no genuine issue of material fact,' since complete failure of proof concerning an essential element of the nonmoving party's case necessarily render all other facts immaterial." *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992).

B. Walker's Water Claim Is On Tribally Owned Trust Lands

Mr. Walker has asserted a water right for land held in trust by the United States and which was already decreed a federal reserved water right by this Court in 1995. See Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin (August 2, 1995), *aff'd sub nom. Fort Hall Water Users Assn. v. United States et al.*, 129 Idaho 39, 921 P.2d 739 (1996) (hereinafter "Decree.").

Mr. Walker has claimed a right to the use of water from the Blackfoot River for the irrigation of Tribally or individually owned trust property.⁴ "Unquestionably, it has been the

⁴ Trust land is owned by the federal government but set aside for the exclusive use of an Indian or tribe, the "beneficial owner." Trust land, being federally owned, is immune from state regulatory laws jurisdiction, may not be sold without without the federal government's consent.

policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.” *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941). Thus, “Congress has the exclusive right to extinguish Indian title to lands. *Id.* at 347; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). Adverse possession cannot occur on Tribal trust lands.

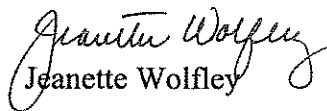
When a river which forms a boundary between two parcels of land moves by processes of “erosion and accretion”, the boundary follows the movements of the river. On the other hand, when a river which forms a boundary between two parcels of land abruptly moves, as here, from its old channel to a new channel through an event known as “avulsion”, the boundary remains defined by the old river channel. *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918). In this case, an avulsion occurred in 1964 when the Blackfoot River was realigned by the U.S. Corp of Engineers. Reservation land was relocated onto the northern side of Blackfoot River channel and remains Tribal trust land. Claimant obtained no ownership interest in the land despite his use of the land. There is no reason to grant this water claim.

CONCLUSION

For the foregoing reasons, the claims of Mr. Marion Walker to a water right used on the Fort Hall Reservation should be modified and/or denied, and we respectfully urge the Special Master to do so.

Dated this 11th day of January, 2008.

Respectfully submitted,


Jeanette Wolfley

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JAN 14 2008

DEPARTMENT OF
WATER RESOURCES

Jeanette Wolfley, ISB #3968
Attorney At Law
202 North Arthur
Pocatello, ID 83204
(208) 232-1922
Facsimile: (208) 232-7472
wolfleyj@ida.net

Attorney for Shoshone-Bannock Tribes

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

In Re SRBA	)	Subcase No. 27-00016C
	)	
Case No. 39576	)	AFFIDAVIT OF FREDERICK A.
	)	HERNANDEZ IN SUPPORT OF SHOSHONE-
	)	BANNOCK TRIBES MOTION FOR
_____	)	SUMMARY JUDGMENT

State of Idaho)
) ss:
County of Bingham)

I, Frederick A. Hernandez, being first duly sworn upon oath depose and state as follows:

1. I am employed with the United States Bureau of Indian Affairs as an Agricultural Engineer. I have worked in the area of engineering, surveying and environmental compliance for the past 32 years.

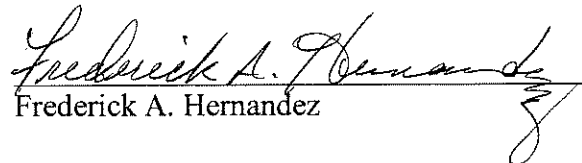
2. I have personal knowledge of information pertaining to the various cession agreements between the United States and the Shoshone-Bannock Tribes, and current boundaries of the Fort Hall Reservation in southeastern Idaho.

3. I have personal knowledge of the boundary re-surveys performed by the United States Department of Interior, Bureau of Land Management along portions of the northern boundary of the Fort Hall Reservation. I have reviewed the re-surveys and determined that certain lands owned by the Shoshone-Bannock Tribes and individual members of the Tribes are located on the northern side of the present Blackfoot River channel, and certain lands owned by non-Indian water users are located on the southern side of the present Blackfoot River channel.

4. I have personally conducted a site visit of the re-surveyed area and observed cultivation and other use on Reservation lands by the claimant, who has claimed a water right in the Snake River Basin Adjudication for said lands. Based on the boundary re-surveys the claimant's place of water use is partially on Tribally or individually owned Indian lands.

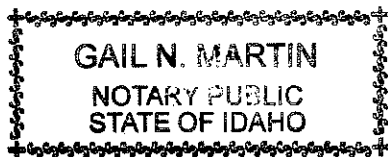
I HEREBY CERTIFY that the facts set forth above are true and correct to the best of my information and belief.

Dated this 11th day of January, 2008.


Frederick A. Hernandez

Subscribed and sworn to before me this 11th day of January, 2008, by Frederick A. Hernandez.

Witness and my hand and official seal.




Notary Public
Residing at Bingham County, Idaho
My Commission expires: May 9, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2008 I caused to be mailed postage prepaid, a true and correct copy of the Shoshone-Bannock Tribes' MOTION FOR SUMMARY JUDGMENT and MEMORANDUM OF LAW IN SUPPORT OF SHOSHONE-BANNOCK TRIBES' MOTION FOR SUMMARY JUDGMENT to the following:

Original To:

Clerk of the District Court
SRBA
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

Copies to:

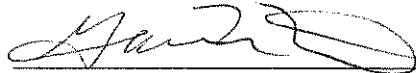
Marion P. Walker
215 Clifford Street
Blackfoot, ID 83221

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PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environmental & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449


Gail N. Martin