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DEPARTMENT OF
WATER RESOURCES

**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

Case No. 39576

Subcase: 63-27475

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Janicek Properties LLC ("Janicek"), the claimant in subcase number 63-27475, through its counsel, Givens Pursley LLP, files this Memorandum in Support of Motion for Summary Judgment.

INTRODUCTION

Since 1951, Janicek and its predecessors in interest have diverted and beneficially used at least 1.4 cubic feet per second ("cfs") of the waters of Purdam Gulch Creek to irrigate 70 to 80 acres of farm land in west Ada County. Janicek's predecessor filed a claim in the Snake River Basin Adjudication ("SRBA") for this water right (identified as water right number 63-27475). The Idaho Department of Water Resources ("IDWR") investigated the claim and recommended

that the Court decree Janicek a water right for 1.4 cfs to irrigate 70 acres with the source of water being Purdam Gulch Creek.¹

Nampa & Meridian Irrigation District ("NMID") objected to IDWR's recommendation, asserting that it owns Purdam Gulch Creek (and, apparently, all of the water flowing in it because NMID alleges the water is "waste water"). NMID also asserts that recommended water right 63-27475 should not exist. Specifically, NMID stated:

The claimed water right is within the boundaries of Nampa & Meridian Irrigation District ("NMID") and the source of said claim is a drain which was constructed or enlarged by or for NMID. Said drain is owned, operated, maintained and controlled by NMID and the water within said drain is seepage or waste water that has been developed, captured and/or controlled by NMID. Therefore, said water is not subject to appropriation, would amount to an impermissible trespass, and this claimed water right should not exist.

The U.S. Bureau of Reclamation ("BOR") filed a response to NMID's objection, also asserting that the water right should not exist.

NMID and BOR, however, cannot show that Janicek is not entitled to have this Court issue a partial decree for water right number 63-27475 as recommended by IDWR. They cannot show that IDWR incorrectly recommended any element of the water right. In addition, they cannot show that NMID "owns" Purdam Gulch Creek or the water flowing in it. Accordingly, this Court should grant Janicek's motion for summary judgment and order that Janicek is entitled to water right number 63-27475 as recommended by IDWR.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts

¹ Although not relevant here because Janicek has not objected to IDWR's recommendation, the claim was for 1.6 cfs of water to irrigate 80 acres with a priority date of June 20, 1943.

are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). A mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990).

DISCUSSION

I. Claim 63-27475 Represents a Valid Water Right.

Recommended water right number 63-27475 represents a valid appropriation of water under Idaho's constitution and statutes. Article XV, Section 3, of the Idaho Constitution states that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Code § 42-101 states that "[a]ll the waters of the state, when flowing in their natural channels including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state . . . and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed." Idaho Code § 42-103 confirms "the right to use the unappropriated waters of rivers, streams, lakes, springs and of subterranean waters or other sources within this state" through appropriation using the application, permit and license procedures.

Prior to 1971, a surface water right, such as the claimed right at issue here, could be appropriated simply by the act of diverting the water to a beneficial use (i.e. the "constitutional method"). *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996).²

² Since 1971, "[t]he right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall be acquired only by appropriation under the [water code's] application, permit and license procedure." I.C. § 42-103.

NMID and BOR do not—and cannot—dispute that: 1) approximately twenty years before the application/permit/license requirements of I.C. § 42-103 came into effect, Janicek's predecessors diverted at least 1.4 cfs of the waters of Purdam Gulch Creek for irrigation; 2) Janicek has continuously diverted water from Purdam Gulch Creek for irrigation (*See* Affidavit of B. Janicek, ¶ 5.); 3) Janicek has not abandoned its use of the water; and 4) no party is claiming to have adversely possessed Janicek's right to use the water.

IDWR's recommendation is entirely consistent with the above facts and constitutes prima facie evidence of the elements of water right 63-27475. I.C. § 42-1411(4); *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001). "Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." I.C. § 42-1411(5). NMID and BOR cannot meet this burden as to any of the recommended elements of water right 63-27475; therefore, this Court should issue a partial decree for the water right as recommended.

II. As a Matter of Law, NMID's Reasons Supporting its Objection are Without Merit.

Rather than attacking any particular element of IDWR's recommendation, NMID asserts that water right number 63-27475 should not exist at all. In its objection, NMID asserts that it "owns" Purdam Gulch Creek, that all of the waters in Purdam Gulch Creek are "seepage or waste water," that it has developed, captured and controls, and as a consequence, Janicek's appropriation is illegal and an "impermissible trespass." The undisputed facts do not support these allegations in the first instance. Further, notions of "capture" and "control" are not the basis for establishing a water right, but rather it is diversion and beneficial use, which NMID cannot establish with respect to the waters of Purdam Gulch Creek.

A. NMID does not “own” Purdam Gulch Creek.

NMID asserts that Purdam Gulch Creek is a “drain which was constructed or enlarged by or for NMID” and that “[s]aid drain is owned, operated, maintained and controlled by NMID.” Janicek does not dispute that BOR has altered Purdam Gulch Creek from its original state to facilitate drainage of irrigated lands within NMID’s boundaries, and that NMID has assumed the responsibility for ongoing work to maintain Purdam Gulch Creek’s drainage capabilities. Janicek, however, owns the relevant reach of Purdam Gulch Creek and, as a matter of law, modifications BOR and NMID may have made to Purdam Gulch Creek to improve drainage from adjacent lands do not vest ownership of Purdam Gulch Creek—a natural watercourse—in NMID.

(1) Janicek owns the relevant reach of Purdam Gulch Creek.

Purdam Gulch Creek crosses Janicek’s property diagonally, roughly from the southeast corner to the northwest corner. By a recorded warranty deed, Janicek acquired the entirety of the SE 1/2 of the NE 1/4 of Section 15, T3N, R1W, B.M., through which Purdam Gulch Creek runs. A copy of the deed is attached as Exhibit B to the Affidavit of Bradley J. Janicek. Janicek acquired this property from Brad and LouAnn Janicek,³ who had acquired the property in 1996. *See* Affidavit of Bradley J. Janicek, Exhibit A. When Brad and LouAnn Janicek acquired the property in 1996, they obtained title insurance on the property. The title insurance, among other things, insures that they obtained fee title to the property, subject only to the exceptions contained in the relevant schedules. A copy of the Janiceks’ title insurance policy is attached as Exhibit C to the Affidavit of Bradley J. Janicek. The title policy confirms that when Bradley and LouAnn acquired the property, no recorded instruments existed when the Janiceks acquired the property that granted or asserted any ownership interest in the property other than for a single

³ Brad and LouAnn Janicek are the owners and members of Janicek Properties, LLC.

utility easement (which does not belong to NMID or BOR). Since the title insurance policy was issued, neither Brad and LouAnn Janicek nor Janicek Properties, LLC, has granted or agreed to grant to NMID or BOR, either orally or in writing, any rights in this property, including rights in Purdam Gulch Creek. *See* Affidavit of Bradley J. Janicek, ¶ 3. Janicek thus holds title to the bed and banks of the reach of Purdam Gulch Creek that crosses its property.⁴

(2) NMID, at most, holds an easement in Purdam Gulch Creek.

Neither NMID nor BOR have identified any agreement or other document given by any owner in the chain of title for Janicek's property that purports to grant either of them any interest in Mr. Janicek's property, let alone ownership of the bed and banks of Purdam Gulch Creek. The patent to the property, issued by the United States in 1903 granted the original settler fee title subject only to a reservation of a right-of-way for ditches and canals constructed by the United States. *See* abstract of patent, attached as Exhibit A to Affidavit of Michael Lawrence. To the extent the United States has exercised its right under this reservation by deepening and channelizing Purdam Gulch Creek through Mr. Janicek's property, or elsewhere, to induce drainage from adjacent lands, it has perfected only a right-of-way for carrying away drainage water, and nothing more.

NMID holds up a *quit claim* deed from the United States as the source of its alleged title to Purdam Gulch Creek, but at best, the United States only held (and could only convey) a right-of-way for drainage across the Janicek Property. The 2001 quitclaim deed from the United States to NMID conveyed without any warranty of title or otherwise, whatever interest it might

⁴ The title policy contains standard exceptions for easements or claims of easements not shown by public records, matters that would be disclosed by an examination of the premises, reservations in patents and water rights. This would include a statutory easement or right-of-way such as is recognized by Idaho Code § 42-1102 for the delivery of irrigation water (as opposed to drainage) that may have existed at the time Janicek acquired title, and the reservation by the United States in the original patent of a right-of-way for ditches and canals constructed by the United States. But an easement or right-of-way in Purdam Gulch Creek across the Janicek property for whatever purposes, is, however, far different from the outright ownership of Purdam Gulch Creek that NMID claims here.

have had in ditches, canals and other facilities that the United States originally constructed within the NMID boundaries, including whatever interest it may have had in a right-of-way for drainage coincident with the course of Purdam Gulch Creek. *See* Quitclaim Deed, attached as Exhibit B to Affidavit of Michael Lawrence. Warranty or not, the United States could convey no more than it held. At most then, NMID could have acquired only a right-of way through Mr. Janicek's property coincident with the course of Purdam Gulch Creek for carrying away drainage water. That is a far cry from ownership of the Creek itself. The BOR's quitclaim deed to NMID expressly also does not convey any water or water rights to NMID.

(3) Purdam Gulch Creek is and was a natural watercourse containing public waters.

The Idaho Supreme Court has defined a natural watercourse as:

[A] stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Burgess v. Salmon River Canal Co., 119 Idaho 299, 305, 805 P.2d 1223, 1229 (2001); *Loosli v. Heseman*, 66 Idaho 469, 481, 162 P.2d 393, 398 (1945). All evidence shows that Purdam Gulch Creek meets this definition—that is, it contains a year-round stream of water flowing in a definite channel having a bed and banks that eventually discharges into another body of water (i.e. Mason Creek, and then the Boise River). *See* Aff. of S. King, ¶¶ 2-9, Exhibit B. As a natural watercourse, its waters are subject to appropriation by the public as a matter of constitutional and statutory right. *See supra discussion*, Section I.

It must be undisputed that Purdam Gulch Creek was a natural watercourse prior to its being deepened and straightened by BOR or NMID to facilitate drainage. As shown on page 1 of the Estimate of Cost for the Nampa-Meridian Drainage System attached to the 1915 Contract

between BOR and NMID provided by BOR in response to Janicek's discovery requests, Purdam Gulch was a "natural drainage course" that BOR agreed would be "straightened and deepened" to become formal parts of the irrigation district's drainage system. *See* Aff. of Michael Lawrence, Exhibit C.

There also is no dispute that the BOR actually deepened and straightened Purdam Gulch Creek to facilitate drainage of lands waterlogged by inefficient irrigation practices. But those actions do not change its character as a natural watercourse. Simply put, a natural watercourse does not lose its identity merely because man has manipulated it. *See Burgess*, 119 Idaho 299, 305, 805 P.2d 1223, 1229 (finding that, although a large dam and other works altered the flow of Salmon Falls Creek, the creek still met the criteria for a natural water course); *see also Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1060 (1909) (affirming trial court's finding that Watson Slough remained a natural water course existed and exists even though an appropriator "made some slight improvements in the way of lowering the bed of the channel and removing sand and gravel bars, and also constructed a small wing dam in the Snake river in order to divert a larger volume of water into Watson slough than had formerly been flowing through that channel").

No other rule is workable. The only logical extension of NMID's position is that no water rights can be perfected within its boundaries because once waste water, seepage, incidental recharge and return flows from its irrigation reach a natural stream that has been modified in any way, that stream becomes a control device that it owns, together with the water in it. That presumably includes Indian Creek (which, until recently, was confined in a tunnel under the City of Caldwell), the Boise River (which has been substantially dammed, dredged, channelized and manipulated from its headwaters to its confluence with the Snake River by BOR and numerous irrigation entities), or the Snake River (which has been dammed, channelized, dredged, operated

and maintained at various points throughout their length to accommodate irrigation, drainage, hydropower, navigation and salmon flow augmentation) as streams that are no longer natural watercourses from which the public may appropriate water, as guaranteed by the Idaho Constitution.⁵

B. NMID does not “own” the water in Purdam Gulch Creek.

As mentioned above, IDWR’s recommendation names Purdam Gulch Creek as the source of water right number 63-27475, and makes no reference to the presence of “waste water.” Nevertheless, NMID asserts in its objection that the water within Purdam Gulch Creek “is seepage or waste water that has been developed, captured and/or controlled by NMID” and that this somehow makes the water “not subject to appropriation.” Much of the water in Purdam Gulch Creek may derive from seepage or return flows from irrigation deliveries, but NMID’s contention that it “owns” such waters has no basis in prior appropriation law.

(1) One can obtain a water right in “waste water.”

As an initial matter, even if one concedes that Purdam Gulch Creek is a “drain” containing “waste water” that derives solely from irrigation of lands within the NMID boundaries (which Janicek does not concede), Idaho law still allows one to establish a water right in waste water, including waste water in drains. Idaho Code Section 42-107 expressly extends the laws governing water right appropriations to manmade ditches “constructed for the purpose of utilizing seepage, waste or spring water of the state.” *See Colthrop v. Mtn. Home Irr. Dist.*, 66

⁵ Among water users, delivery organizations and administrators in Boise Valley, it is well-known that the irrigation developments and manipulation of watercourses under the Boise Project have resulted in the situation where the natural flow water rights perfected with points of diversion from the lower Boise River are satisfied almost exclusively with return flows (i.e., water accruing to the Boise River through direct drain water discharges, seepage from irrigation canals and laterals and return flows resulting from incidental recharge of the shallow aquifer due to irrigation. *See* Water District 63 Watermaster’s Report excerpt attached as Exhibit D to Affidavit of Michael Lawrence. Under NMID’s and BOR’s view, like Purdam Gulch Creek, the natural streams that carry some of these return flows and indeed the Boise River itself together with all the water that accrues to them are owned by either the BOR or the irrigation entity whose irrigation deliveries generated them, and all the claimed appropriations from those sources would be illegal trespass.

Idaho 173, 157 P.2d 1005 (1945), *quoting Sebern v. Moore*, 44 Idaho 410, 418, 258 P. 176, 178 (1927) (“surface waste and seepage water may be appropriated under the provisions of C.S., § 5562 [now Section 42-107], subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use”). Clearly, Janicek can establish a water right that consists of waste or seepage waters under Idaho law.

(2) Purdam Gulch Creek’s waters have not been beneficially used by NMID.

Moreover, even if Purdam Gulch Creek is characterized as a “drain,” that contains waste, seepage, or return flows from irrigated lands within NMID’s boundaries, those waters are nevertheless public waters that are subject to appropriation, and are not “owned” by NMID or the BOR because they have not applied the water to beneficial use. *See J. WARNER MILLS, Mills’ Irrigation Manual for Lawyers, Irrigation Officers, Engineers and Water Users* at 102-03 (1907) (“A diversion of water for drainage, without any intention to apply it to a beneficial use, does not make an appropriation of such water.”); *see also id. and CLESSON S. KINNEY, A Treatise on the Law of Irrigation and Water Rights Vol. 2* at 1206 (2d ed., 1912) (“Water flowing in a drainage ditch without any intention to recapture it, is abandoned.”) *See also* 43 U.S.C. §§ 372 (the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right).

Whatever modifications NMID and BOR made to Purdam Gulch Creek, those modifications were made to carry away excess water. The information provided to Janicek by the NMID and the BOR through discovery does not disclose any original intent to beneficially use any drainage water in Purdam Gulch Creek induced by the BOR’s deepening and

straightening efforts.⁶ See Exhibit C to Affidavit of Michael Lawrence (915 Contract). As a matter of law, because there was no intention apply water from Purdam Gulch Creek to beneficial use, NMID has no basis to claim any interest in those waters, let alone that it “owns” them.

Yet, it is apparent from NMID’s objection that it does believe it “owns” all water in Purdam Gulch Creek that can be attributed to irrigation of NMID lands, and that NMID can prevent others from appropriating that water, even though NMID does not put the water to beneficial use itself. NMID’s position that water accruing to natural streams (or drains) as surface waste, seepage or return flow incident to its irrigation deliveries is “private water,” or water under its “control,” or water that it “owns” is misplaced. This is incorrect because they have relinquished any claim to use this water once they have delivered it to their consumers without taking actions to save or recapture the water before it reaches the public water supply.

As then-Presiding SRBA Judge Burdick correctly held when the issue was presented to him in 2003:

The situation is different if after the original appropriator relinquishes control of the waste water and the water returns to, and is commingled with, a natural stream or aquifer prior to being appropriated by a third party. The water is then considered “return flow” and is subject to appropriation by third parties as part of that tributary body of water. In such a situation, third party junior appropriators relying on the return flow have rights which in effect place limitations on the original appropriator’s ability to alter the consumptive use of the original right. See *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926); *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944) (establishing junior user’s right to existing conditions).

In re SRBA Case No. 39576, Order on Challenge at 16 (Apr. 25, 2003), *aff’d A&B Irrig. Dist. v. Aberdeen-Springfield Ground Water District et al*, 141 Idaho 746, 118 P.3d 78 (2005). In other

⁶ It is clear that recaptured water must be applied to beneficial use on the same lands to which the water was applied in its original application. See *U.S. v. Pioneer Irr. Dist.*, 157 P.3d 600, 608 (2007) (quoting I.C. § 42-915 for the proposition that a “water right shall forever remain a part of said tract of land”).

words, the “waste water” that NMID suggests it has “developed, captured and/or controlled” really is water that has become part of the public waters by virtue of having been commingled with waters of natural watercourses and the aquifer. As such, the waters are subject to appropriation by third parties such as Janicek.⁷

Accordingly, Janicek’s appropriation of the waters of Purdam Gulch Creek cannot be an “impermissible trespass” as alleged by NMID because NMID does not own Purdam Gulch Creek or its waters. As a matter of law, the NMID and BOR position must be rejected. If that position prevailed—if NMID “owns” the natural streams within its district boundaries and the waters in them, then what becomes of Janicek’s water right, must become of all the water rights developed in the natural streams, including the Boise River itself, within the extensive boundaries of the BOR’s Boise Project over the past 100 years. As discussed, Idaho’s constitution and laws vest the public with ownership of the state’s waters and provide for the public’s appropriation of such waters. NMID therefore has no basis for alleging that Janicek’s appropriation of water from Purdam Gulch Creek constitutes a trespass.

CONCLUSION

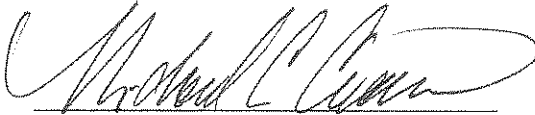
NMID and BOR cannot satisfy their burden of showing that IDWR’s recommendation for water right number 63-27475 was in error. The undisputed evidence shows that Janicek and its predecessors have diverted and put to beneficial use the water right described in IDWR’s recommendation since at least as early as 1951. The constitution and laws of the state of Idaho guarantee Janicek’s right to appropriate water from Purdam Gulch Creek. Accordingly, this Court should grant summary judgment in favor of Janicek and decree water right number 63-27475 as recommended by IDWR.

⁷ NMID, BOR or their consumers could undertake efforts to prevent seepage and other incidental return flows and Janicek could not complain. But Janicek still has a water right. If NMID or the BOR desire a water right from Purdam Gulch Creek they can make similar appropriations subject to Janicek’s prior right.

DATED this 15th day of February, 2008.

Respectfully submitted,

GIVENS PURSLEY LLP

By 

Michael C. Creamer
Michael P. Lawrence

I HEREBY CERTIFY that on this 19th of February, 2008, the foregoing was filed,
served, or copied as follows:

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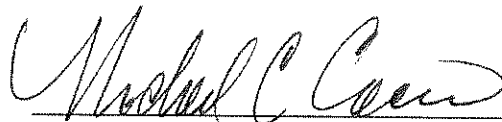
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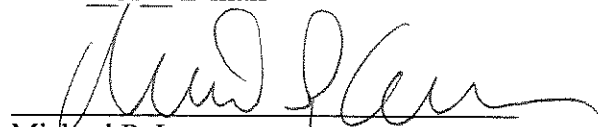
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