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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,
Case No. 39576

Subcase No. 63-3614
(Anderson Ranch Reservoir)

**MEMORANDUM IN SUPPORT OF PIONEER
AND SETTLERS IRRIGATION DISTRICTS'
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	1
A. Nature Of The Case	1
B. Course Of Previous Proceedings	1
C. Statement Of Facts.....	2
III. STANDARD OF REVIEW	3
IV. ARGUMENT	5
A. Idaho Code Section 42-220 Requires The Department To Include The Subordination Language Because It States That Water Right Licenses Are Binding Upon The State.....	5
1. The Plain Language Of Section 42-220 Demonstrates That The Department Cannot Use The SRBA To Alter A Water Right Previously Licensed By The State	5
2. This Court Has Held That Section 42-220 Prohibits The Department From Using The SRBA To “Redefine The Use Of A Previously Issued License”	6
3. The Department’s Recommendation For 63-3614 Redefined The Water Right In Violation Of Section 42-220 And The Facility Volume Case.....	7
B. Idaho Statutes Prohibit The Enlargement Of An Existing Water Use And Require That A New Water Right Be Issued For Any Enlarged Use Of An Existing Water Right.....	8
V. CONCLUSION.....	9

TABLE OF CASES AND AUTHORITIES

Cases

<i>Ambrose ex. rel. Ambrose v. Buhl Joint Sch. Dist. No. 412</i> 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1994).....	3
<i>City of Idaho Falls v. Home Indem. Co.</i> 126 Idaho 604, 888 P.2d 383 (1995).....	3
<i>G&M Farms v. Funk Irrigation Co.</i> 119 Idaho 514, 808 P.2d 851 (1991).....	3, 4
<i>Garzee v. Barkley</i> 121 Idaho 771, 828 P.2d 334 (Ct. App. 1992).....	3
<i>In Re SRBA</i> , Case No. 39576, Consd. Subcase No. 91-63	3
<i>In Re SRBA</i> , Case No. 39576, Subcase No. 36-02708.....	6
<i>Kline v. Clinton</i> 103 Idaho 116, 645 P.2d 350 (1982).....	3, 4
<i>Land O' Lakes, Inc. v. Bray</i> 138 Idaho 817, 69 P.3d 1078 (Ct. App. 2003).....	4
<i>Nelson ex. rel. Nelson v. City of Rupert</i> 128 Idaho 199, 911 P.2d 1111 (1996).....	3
<i>Theriault v. A.H. Robbins Co.</i> 108 Idaho 303, 698 P.2d 365 (1985).....	4
<i>United States v. Pioneer Irrigation Dist.</i> 144 Idaho 106, 157 P.3d 600 (2007).....	3

Statutes

IDAHO CODE § 42-1412.....	4
IDAHO CODE § 42-1425.....	9
IDAHO CODE § 42-220.....	2, 5, 6, 7, 8, 9, 10
Idaho Rule of Civil Procedure 56	1, 3

I.
INTRODUCTION

Pioneer Irrigation District and Settlers Irrigation District (collectively, hereinafter the “Districts”) hereby file this Memorandum in Support of Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56. The Districts have filed the Motion for Summary Judgment and an Affidavit of Dylan B. Lawrence in Support of Motion for Summary Judgment contemporaneously herewith.

II.
STATEMENT OF THE CASE

A. Nature Of The Case

This subcase arises in the context of the Snake River Basin Adjudication (“SRBA”). Pioneer Irrigation District and Settlers Irrigation District (collectively, hereinafter the “Districts”) object to the Idaho Department of Water Resources’ (the “Department”) recommendation of water right no. 63-3614 (the “Water Right”) without critical language from the previously issued license stating that the use of water for power purposes is subordinate and subject to the use of water for irrigation purposes.

B. Course Of Previous Proceedings

The Department issued its recommendation for the Water Right on September 24, 2002. *See* Exhibit A to Affidavit of Dylan B. Lawrence (hereafter “Lawrence Aff.”). In January of 2003, the Districts timely objected to the Department’s recommendation on several grounds, specifically including the Department’s failure to include language from the license for the Water Right stating that the use of water for power purposes is subordinate and subject to the use of water for irrigation purposes. *See* Lawrence Aff., Ex. B.

C. Statement Of Facts

Both of the Districts have irrigation storage rights in Anderson Ranch Reservoir pursuant to contracts with the Bureau of Reclamation, and, therefore, have important interests that are directly affected by the Department's recommendation of the Water Right. *See* Lawrence Aff., Exs. C and D. The Districts base their objection in this subcase on the water right license issued by the state of Idaho on December 17, 1956. *See* Lawrence Aff., Ex. B. When the state issued the license for the Water Right, it specifically included the following language as part of the quantity element:

493,161 ac.ft. for irrigation and such power *as can be generated by use of water released for irrigation.*

See Lawrence Aff., Ex. E (emphasis added).

This language demonstrates that water use for power purposes is incidental to the use of water for irrigation. In other words, the use of water for power purposes can only occur if the water is first being used for irrigation purposes. However, when the Department issued its recommendation for the Water Right, it did not include this critical language from the license. *See* Lawrence Aff., Ex. A. Therefore, the Districts object to the Department's use of the SRBA to radically change the terms of the Water Right.

For the reasons set forth in this Memorandum, the Districts respectfully request that this Court revise the Department's recommendation to include the critical subordination language from the original license. The Districts base their request in part on Idaho Code Section 42-220, which states that a water right license is "binding upon the state" and "prima facie evidence as to such right."

III. STANDARD OF REVIEW

The Districts file this Motion pursuant to Rule 56 of the Idaho Rules of Civil Procedure. As this Court has stated, summary judgment is appropriate when the pleadings, depositions, admissions and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See In Re SRBA*, Case No. 39576, Consd. Subcase No. 91-63, Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 10-11 (5th Dist. Sept. 2, 2004) (Melanson, J.) (citing IDAHO R. CIV. P. 56(c); *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383 (1995)); *see also United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 109, 157 P.3d 600, 603 (2007).

In addition, summary judgment is appropriate when a party fails to submit evidence to establish an essential element of their claim. *Ambrose ex. rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994); *Nelson ex. rel. Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1113 (1996). Facts in dispute cease to be material facts when a claimant fails to establish a *prima facie* case; in such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992); *Ambrose ex. rel. Ambrose, supra*.

Typically, the nonmoving party is entitled to the benefit of all inferences which might reasonably be drawn from the evidence. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). However, the nonmoving party may not rest on mere allegations or denials of that

party's pleadings to avoid summary judgment. *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 698 P.2d 365 (1985). The nonmoving party's case must not rest on mere speculation, because a "scintilla of evidence" is not enough to create a genuine issue of material fact. *G&M Farms, supra; Kline, supra*.

In addition, in the Snake River Basin Adjudication proceedings, cases are tried without a jury. I.C. § 42-1412(5). In such circumstances:

When an action is to be tried without a jury . . . the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." [Citations omitted].

Land O' Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

This case may be resolved as a matter of law and may be properly decided on summary judgment. The Districts' argument shows that the Department's failure to include the critical language subordinating the use of water for power purposes to the use of water for irrigation purposes in its recommendation is contrary to Idaho statutes, which provide that a water right license is binding on the State and that a water right may not be enlarged in the SRBA.

IV. ARGUMENT

A. Idaho Code Section 42-220 Requires The Department To Include The Subordination Language Because It States That Water Right Licenses Are Binding Upon The State

1. The Plain Language Of Section 42-220 Demonstrates That The Department Cannot Use The SRBA To Alter A Water Right Previously Licensed By The State

The Department cannot use the SRBA process to alter a condition of a water right license, because doing so is specifically prohibited by Idaho Code Section 42-220. That statute provides in its entirety:

42-220. EFFECT OF LICENSE. *Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right;* and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

I.C. § 42-220 (emphasis added).

Of critical importance is the highlighted portion of this statute, which provides that a water right license “*shall be binding upon the state* as to the right of such licensee to use the amount of water mentioned therein” *Id.* (emphasis added). This statutory language unambiguously provides that a water right license is binding upon the state, except in a few limited circumstances which do not apply in this case. Further, Section 42-220 states that a water right license is “prima facie evidence as to such right.”

2. This Court Has Held That Section 42-220 Prohibits The Department From Using The SRBA To “Redefine The Use Of A Previously Issued License”

This Court has specifically held that Section 42-220 prohibits the Department from using the SRBA to “redefine the use of a previously issued license. . . .” *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue, pp. 14-18 (5th Dist. Dec. 29, 1999) (Wood, J.) (hereinafter, the “Facility Volume Order”). In the Facility Volume case, one of the issues decided by this Court was whether the Department could use the SRBA to impose a new facility volume limitation on a licensed water right. Facility Volume Order, pp. 6-8, 14-18. In addressing this issue, then-Special Master Haemmerle stated:

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right.” I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the “state” as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use of a licensed water right. Under these circumstances, the question is which statute controls.

. . . “It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute.” *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). “[T]o the extent that two statutes conflict, the more specific governs over the more general.” *Id.* ***Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state*** [footnote 4 cited].

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. . .

. . . The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued.

Id. at 14-15 (quoting *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Supplemental Findings of Fact and Conclusions of Law (Facility Volume) (5th Dist. July 31, 1998) (Haemmerle, S.M.)) (footnotes omitted) (emphasis added).

Then-Presiding Judge Wood upheld and adopted Special Master Haemmerle’s analysis. Facility Volume Order, p. 18. In summary, this Court relied upon Section 42-220 in holding that the Department may change a licensed water right to the extent necessary to “define, clarify, or administer” the right, but may ***not*** “redefine the use of a previously issued license.”

Id. at 14-15.

3. The Department’s Recommendation For 63-3614 Redefined The Water Right In Violation Of Section 42-220 And The Facility Volume Case

In this case, the Department redefined the use of the Water Right when it issued its recommendation without the critical subordination language set forth in the license. Section 42-220 specifically provides that a water right license “shall be binding upon the state as to the right . . . and shall be prima facie evidence as to such right.” As a result of such

unambiguous language, the Department is bound to the terms of the license when issuing its recommendation.

However, in this case, not only did the Department leave out the critical subordination language, but it also recommended the Water Right with a season of use for power purposes of January 1 to December 31. As such, the Water Right recommendation no longer subordinates the use of water for power purposes to the use of water for irrigation purposes, and allows for water use for power purposes at any time during the year.

Such a drastic change in the use of water under the Water Right constitutes a redefinition of that right, as it goes considerably beyond simply “clarifying” the Water Right. Pursuant to Section 42-220 and this Court’s holding in Facility Volume, this is an impermissible redefinition of the use of water under the Water Right. Therefore, this Court should revise the recommendation to reflect the terms of the license as issued and approved by the state of Idaho, including the language which requires power production to be incidental to irrigation.

B. Idaho Statutes Prohibit The Enlargement Of An Existing Water Use And Require That A New Water Right Be Issued For Any Enlarged Use Of An Existing Water Right

As has been discussed, the quantity element in the license for the Water Right specifically states:

493,161 ac.ft. for irrigation and *such power as can be generated by the use of water released for irrigation use.*

See Lawrence Aff., Ex. E (emphasis added). This language unambiguously provides that the use of water for power purposes is incidental and subordinate to the use of water for irrigation purposes. However, the Department’s recommendation for the Water Right omits this language entirely, and provides for a period of use for power purposes from January 1 to December 31.

As such, the Water Right, as recommended, allows for the use of water strictly for power purposes during the entire year and without regard to irrigation, which is a drastic departure from the terms of the license. Not only does this violate Section 42-220, as has been explained, but it constitutes an enlargement of the use of water for power purposes at the expense of irrigation, which also violates other aspects of Idaho law.

The only potential legal justification for such a change would be if it qualified as an accomplished transfer pursuant to Idaho Code Section 42-1425. Generally speaking, that statute allows water users to change the place of use, point of diversion, nature or purpose of use, or period of use for a given water right, if the change was established prior to the initiation of the SRBA. However, an accomplished transfer is not available here for a few reasons. First, an accomplished transfer is available only if the change does not injure existing water rights or create an enlargement of the original water right. I.C. § 42-1425. In addition, the Department's revision of the Water Right relates to the quantity element defined in that license. Quantity is not one of the elements identified in the statute as capable of being changed by an accomplished transfer. Therefore, the change represents an enlargement of the Water Right's power purpose of use at the expense of irrigation, which is specifically prohibited by Section 42-1425. Therefore, this Court should restore the critical subordination language in the recommendation.

V. CONCLUSION

This Court may decide this case as a matter of law, because there are no disputed issues of fact. As this Memorandum has explained, the Department lacks the legal authority to omit from its recommendation for the Water Right the critical language from the license stating that the use of water for power purposes is incidental to the use of water for irrigation purposes.

Idaho Code Section 42-220 and applicable case law clearly establish that a license is “binding upon the state” and may not be “redefined” in the SRBA. Omitting the subordination language not only redefines the Water Right, but also creates an impermissible enlargement of the power use at the expense of irrigation, in violation of Idaho statutes. As a result, the Department has no legal basis for radically changing the terms of the Water Right as it has done in its recommendation. Therefore, the Districts respectfully request that this Court grant their Motion for Summary Judgment and revise the Director’s recommendation to include the subordination language set forth in the Water Right license.

DATED this 28th day of February, 2008.

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By 
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2008, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PIONEER AND SETTLERS IRRIGATION DISTRICTS' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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