

DEPARTMENT OF
WATER RESOURCES

altered the Purdam [Drain] 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 [Drain's] drainage capabilities." *Janicek Memo*, pg. 5. However, Janicek's argument is premised on the fact that at the time of Janicek's initial diversion and appropriation (1951), the Purdam Drain was a natural stream subject to appropriation. Janicek's Motion is flawed because for the following reasons:

1. At Janicek's claimed point of diversion, the Purdam Drain is a constructed drain that was constructed and/or paid for by NMID in 1916, and NMID has been operating and maintaining the Purdam Drain since that time. The Purdam Drain may have been enlarged downstream of Janicek's point of diversion, but it was a newly constructed portion of the Purdam Drain at Janicek's point of diversion;
2. The Purdam Drain is a facility of NMID which NMID uses to deliver water to landowners located downstream of Janicek's claimed point of diversion. Thus, Janicek's alternative argument that NMID has not beneficially used the water in the Purdam Drain is false and without merit;
3. Janicek's claimed point of diversion is an impermissible trespass of NMID's Purdam Drain, and Janicek has not obtained the permission of NMID. Idaho law is well settled that one cannot appropriate water through the trespass upon the land of another nor use the ditch of another against his will. The Idaho Department of Water Resources (IDWR) has confirmed this principle; and
4. Janicek knows that he may not divert water from NMID's drains and facilities as he

has previously sought NMID permission to temporarily pump from NMID's drains.

Janicek's current position is inconsistent with the License Agreement he entered into with NMID in 1996 to temporarily pump for NMID's Sky Pilot Drain.

Based upon these facts, Janicek's argument is akin to asserting that a water right can be established in NMID's Ridenbaugh Canal because it was an extension of a natural stream. Such an argument cannot be sanctioned under Idaho law. At a minimum, there continues to remain material issues of fact which would preclude summary judgment.

II. STATEMENT OF FACTS

A. NMID.

NMID is an irrigation district organized under Title 43 of the Idaho. NMID is also a drainage district authorized under Chapter 3, Title 43 of the Idaho Code. NMID was formed in approximately 1904. However, NMID's water rights go back to the 1800s because it purchased the assets of Boise City Irrigation and Land Company, including the water rights, canals, laterals and drain ditches owned by the Boise City Irrigation and Land Company. By 1915, some lands within NMID were incapable of irrigation because of high water tables and NMID entered into a contract with BOR to construct and enlarge a drainage system. *See Affidavit of Michael Lawrence*, Ex. C and *Affidavit of Jerry Gregg*. This drainage system involved both the construction of new drains and the enlargement of existing drains. NMID paid for the construction and enlargement of the drains and miles and miles of drainages were constructed and enlarged as part of this endeavor. *Id.* It should be further noted that the contract between NMID and BOR further provided NMID with the right to the water developed or captured in said drainage system. *Id.* pg. 7, ¶ 5.

B. THE CONSTRUCTION OF THE PURDAM DRAIN.

The earliest accounts of a drainage system are provided in a report by A.D. Foote dated 1887. *See Affidavit of S. Bryce Farris*, Ex. A. This report discusses and provides illustrations of drains for the Ten Mile, Indian, Black and Five Mile. Those drains only had water for “a month or two only in the early spring and were dry the remainder of the year.” *Id.* pg. 17. Noticeably absent is any mention of the Purdam Drain.

Part of the construction of NMID’s drainage system in 1915 included the construction and enlargement of the Purdam Drain.¹ Janicek latches on to the fact that portions of the Purdam Drain may have been enlarged and thus there is a natural creek that must have existed at the location of Janicek’s point of diversion. However, this is contrary to the actual evidence. Even if, for arguments sake, portions of the Purdam Drain existed prior to 1915, there is no dispute that the portion across Janicek’s property did not exist. Janicek’s property lies within a half of a mile of the beginning of the Purdam Drain. Janicek’s property is at the farthest upstream end of the Purdam Drain. This portion of the drain was constructed in or around 1916 and did not exist prior to that time. *See Affidavit of Jerry Gregg*. Thus, even if portions of the Purdam Drain downstream of Janicek’s claimed point of diversion may have been a natural drainage, the relevant reach where Janicek’s claimed point of diversion is located was newly constructed by BOR for NMID.

C. JANICEK’S DIVERSION.

Janicek’s property is located within the boundaries of NMID and Janicek has been

¹ The construction also included the Sky Pilot Drain which as discussed, *infra*, is a drain in which Janicek sought NMID’s permission to temporarily pump from and entered into a recorded license agreement allowing him to do so.

apportioned benefits for both irrigation and drainage purposes. Janicek's property is delivered water by NMID via the Kennedy Lateral. There is no dispute that Janicek's property is located within NMID and has been apportioned benefits prior to 1943, which is when Janicek suggests his predecessor began diverting from the Purdam Drain.

The recommendation for water right no. 63-27475 lists the priority date of March 1, 1951. Interestingly, even though the priority date is 1951, Janicek suggests that he or his predecessor has been diverting from the Purdam Drain since 1943. Nevertheless, as previously discussed, the claimed point of diversion is located within a half of a mile of the beginning of the Purdam Drain and is located below NMID's Ridenbaugh Canal.

D. NMID'S OPERATION OF THE PURDAM DRAIN AND DELIVERIES.

Since at least 1915, NMID has operated and maintained the Purdam Drain as part of its drainage system. Janicek does not dispute that NMID operates and maintains the Purdam Drain, including the portion located across Janicek's property. Janicek has suggested that NMID's objection is without merit because NMID does not beneficially use the water in the Purdam Drain. This argument is contrary to the undisputed facts.

NMID does deliver water to its landowners via the Purdam Drain. *See Affidavit of John P. Anderson*. Said deliveries are located below Janicek's claimed point of diversion. *Id.* NMID has a pump station downstream of Janicek's property which pumps from the Purdam Drain and delivers irrigation water to NMID's landowners, including St. James Place Subdivision. *Id.*

III. STANDARD OF REVIEW

The standard of review under Rule 56 of the Idaho Rules of Civil Procedure is well

established and NMID does not disagree with the standard provided in Janicek's Memorandum. *Janicek's Memo*. Pgs. 3-4. However, NMID would like to point out and remind the Court that: (1) all controverted facts are liberally construed in favor of the non-moving party (NMID); and (2) the burden at all times is on the moving party (Janicek) to prove the absence of a genuine issue of material fact. Lastly, the Court is authorized to enter summary judgment in favor of the non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

IV. ARGUMENT

A. THE PURDAM DRAIN, AT THE LOCATION OF JANICEK'S POINT OF DIVERSION, WAS CONSTRUCTED AND/OR PAID FOR BY NMID.

The Purdam Drain, which was constructed and/or paid for by NMID in 1915 is no different from NMID's Ridenbaugh Canal or other laterals. As with those facilities, the Purdam Drain is a facility owned, operated and maintained by NMID and a landowner cannot simply stick a pump in NMID's facilities and create their own independent water right. Indeed, it is a well settled rule of Idaho law that an appropriation of water cannot be made or a water right issued to appropriate water acquired through trespass upon the land of another. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941); *Jones v. McIntire*, 60 Idaho 338, 344, 91 P.2d 373 (1939). Nor can a valid water right be initiated by using the ditch of another against his will. *Rabido v. Furey*, 33 Idaho 56, 62, 190 P. 73 (1920). "Where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under C.S., sec. 5562 [now I.C. § 42-107]." *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). In this case, the drains, i.e. the Purdam Drain, were constructed and enlarged for NMID and such construction was paid for by NMID. The drains

are owned, operated and maintained by NMID and any claimed water rights within said drains after 1915 would amount to a trespass.

Consistent with the above-referenced law, the Idaho Department of Water Resources has made it clear that appropriations within the boundaries of an irrigation district such as NMID may not be approved without the permission of the irrigation district. As explained by former Director A. Kenneth Dunn in a Memorandum dated September 8, 1981, this requirement of permission by the irrigation district also applies even if the facility is characterized as a “natural channel.” *See Affidavit of S. Bryce Farris, Ex. B.* NMID does not concede that the Purdam Drain in the location of Janicek’s claimed point of diversion could be characterized as a “natural channel” but for argument sake, even if it could, it would still require the written agreement of NMID.

Furthermore, Janicek is estopped from taking the position that the permission of NMID is not required to pump from NMID’s drain due to the fact that Janicek has previously requested the permission of NMID to temporarily pump from an NMID facility known as the Sky Pilot Drain. In fact, in December of 1996, NMID and Janicek entered into a license agreement, recorded in the records of Ada County, Idaho, to temporarily pump from the Sky Pilot Drain. *See Affidavit of S. Bryce Farris, Ex. C.* Like the Purdam Drain, the Sky Pilot Drain is a drain constructed and paid for by NMID and is owned operated and maintained by NMID. It is inconsistent for Janicek to acknowledge and seek NMID’s permission to pump from the Sky Pilot Drain, and to also suggest that he can acquire a water right in NMID’s Purdam Drain without NMID’s consent.

Additionally, as explained, *supra*, NMID does deliver water to its landowners via the Purdam Drain downstream of Janicek’s claimed point of diversion. Janicek’s suggestion that there was no

intent by NMID to beneficially use the water developed by the construction of NMID's drainage system is directly contrary to the provisions of the 1915 contract which expressly provides NMID the right to the water developed in the drains. Thus, Janicek's claimed point of diversion is not only a trespass of NMID's Purdam Drain, but also amounts to an interference with NMID's prior rights to deliver water to downstream landowners.²

Janicek suggests that NMID's position is akin to suggesting that no water rights could be perfected in a natural stream, including the Boise River or the Snake River, because the natural stream has been modified. This argument is misplaced. The distinction between the Purdam Drain and the Boise River is that the Purdam Drain is NOT a natural stream. A more appropriate analogy would be to a drain or ditch constructed out of the Boise River. Said drain or ditch is not a "natural stream" and is not subject to appropriation. Water diverted from its source, i.e. the Boise River, "is the property of the appropriator while it is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator." I.C. § 42-110. In this case, the water in the Purdam Drain is diverted captured, conveyed, used or physically controlled by NMID in NMID's Purdam Drain and is not subject to appropriation. As discussed, *supra*, water in the Purdam Drain belongs to NMID pursuant to its contract with BOR in 1915 which provides NMID the right to the water developed in the constructed drainage system. Furthermore, the water is in possession of the owner

² Pursuant to I.C. § 42-1209, Janicek may not cause or permit his pump and pipeline within NMID's easement without its written consent. Diverting water upstream of NMID's diversions, with a later priority, amounts to an injury and an unreasonable interference with NMID's rights. Furthermore, pursuant to I.C. § 42-1208, NMID's right-of-way for the Purdam Drain is not subject to adverse possession. While this subcase does not specifically address easement and rights-of-way issues, it further shows that Janicek's claimed point of diversion within the Purdam Drain and NMID's easement is improper and should not be judicially sanctioned by the SRBA Court.

of the drain, i.e. NMID, and is not subject to appropriation pursuant to I.C. § 42-107 and *Sebern v. Moore, supra*.

The bottom line is that the undisputed evidence is that the Purdam Drain, in the location of Janicek's claimed point of diversion, is a facility that was constructed for NMID and is owned, operated and maintained by NMID. Janicek's cursory argument that the Purdam Drain is a natural channel subject to appropriation is simply not supported by the facts. Accordingly, NMID requests that the Court issue an order granting NMID summary judgment and disallowing Janicek's claim as an improper trespass. In the alternative, it is clear that there are sufficient material issues of fact which would preclude the granting of Janicek's motion.

B. THE WATER IN THE PURDAM DRAIN IS NMID'S WASTE WATER.

Generally, an irrigation district has the right to recapture and reuse seepage or waste water from irrigation of lands within its boundaries. *Colthrup v. Mountain Home Irr. Dist.*, 66 Idaho 173, 179 (1945); *Sebern v. Moore*, 44 Idaho 410 (1927). "[S]eeepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant." *Thompson v. Bingham*, 78 Idaho 305, 308 (1956). Appropriation of surface waste and seepage is "subject to the right of the owner to cease wasting it, or in good faith, to change the place and manner of wasting it, or to recapture it, so long as he applies it to beneficial use." *Colthrup*, 66 Idaho at 179. The appropriator of waste water has not right to compel the original appropriator to continue to return the waste or seepage water to the stream source. *Hidden Springs Trout Ranch v. Hagerman Water Users Assoc.*, 101 Idaho 677, 680-81 (1980). The appropriator of surface waste and seepage water "cannot acquire a

prescriptive right to the continued flow of waste or seepage water from the land of another.”
Thompson v. Bingham, supra.

More recently, in *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005), the Idaho Supreme Court considered the enlargement claims in the Snake River Basin Adjudication by A & B Irrigation District for water captured in its drains. The captured water was not used on lands which were part of A & B’s original water rights, but rather an enlargement. The Supreme Court held that the use of the recaptured water was not valid because it was being used on new, additional lands which were not part of A & B’s original rights. However, the Court made it clear that :

A & B may use the water on its original appropriated lots. “It is well settled law that seepage and waste water belong to the original appropriator and , in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is will and able to put it to a beneficial use.” *Reynolds Irrigation Dist. V. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950) (citing *U.S. v. Haga*, 276 F.41, 43 (D. Id. 1921)); *see also Sebern*, 44 Idaho at 418, 258 P. at 178.

Id. at 752 (emphasis added).

Janicek argues that he is entitled to NMID’s waste water. This argument again fails because the water in NMID’s drain has been reclaimed and/or recaptured by NMID and is not subject to appropriation for the reasons set forth *supra*. Again, “[w]here there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under C.S., sec. 5562 [now I.C. § 42-107].” *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (emphasis added).

V. CONCLUSION

The undisputed facts are that the Purdam Drain is a constructed drain, which is part of NMID's drainage system, and is used to deliver water to NMID's landowner. The water in the Purdam Drain is owned and controlled by NMID in its constructed drain and is not subject to appropriation. Accordingly, NMID respectfully requests that the Janicek's Motion be denied. In addition, the Court has the authority to grant summary judgment to the non-moving party and NMID requests that the Court do so based upon these facts.

DATED this 13th day of March, 2008.

RINGERT CLARK, CHTD.

A handwritten signature in black ink, appearing to read "S. Bryce Farris", is written over a horizontal line.

S. BRYCE FARRIS
Attorneys for the NMID

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2008, a true and correct copy of the foregoing was served upon all parties listed below by:

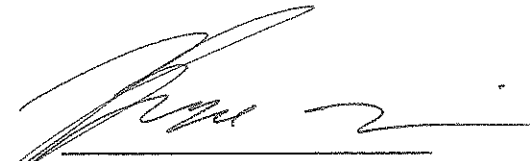
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