



IMPORTANT: This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this transmission or its contents is strictly prohibited. If you have received this transmission in error, please notify us by telephoning and return the original transmission to us at the address given below.

FROM: Labat-Anderson, Inc.
1961 Stout St., 8th Floor
Denver, CO 80294

Fax No. 303-844-1350
Voice No. 303-844-1485

SENT BY: David Jarvis, Paralegal

TO: Diana Delaney **FAX No.** 208-736-2121

cc: IDWR Document Depository 208-287-6701

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 9

SPECIAL INSTRUCTIONS: Attached for filing is United States' Opposition to Janicek's Motion for Summary Judgment in Subcase No. 63-27475.

RONALD J. TENPAS

Assistant Attorney General
Environment and Natural Resources Division

DAVID W. GEHLERT

Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Phone: (303) 844-1386
Fax: (303) 844-1350

Counsel for the United States

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

In In Re SRBA	)	Subcase No.63-27475
	)	
Case No. 39576	)	
	)	
	)	UNITED STATES' OPPOSITION TO
	)	JANICEK PROPERTIES' MOTION FOR
	)	SUMMARY JUDGMENT
	)	

COMES NOW Respondent, the United States, by and through the undersigned counsel, and submits this Memorandum in Opposition to Claimant, Janicek Properties, LLC's (Janicek) Motion for Summary Judgment.

Introduction

Janicek's motion for summary judgment asks this court to sanction an appropriation of wastewater¹ from a drain constructed by the Bureau of Reclamation

¹ "Waste or drain water is surplus water which results from delivery of dedicated water." *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) (citing *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 135, 269 P.2d at 755-56 (1954)).

(Reclamation) and now owned by the Nampa & Meridian Irrigation District (NMID). Janicek's motion must be denied because the Idaho Supreme Court has directed that wastewater collected in a constructed drain is not subject to appropriation.

Standard of Review

Summary judgment may only be granted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "[I]f any genuine issue of material fact remains unresolved summary judgment is improper." *McKinley v. Fanning*, 100 Idaho 189, 190, 595 P.2d 1084, 1085 (1979); *Nielsen v. Provident Life and Accident Ins. Co.*, 100 Idaho 223, 596 P.2d 95 (1979). In ruling on a motion for summary judgment, "all facts and inferences must be drawn in favor of the nonmoving party...." *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590, 887 P.2d 1094, 1097 (Idaho Ct. App. 1994); *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979) ("facts should be liberally construed in favor of the party against whom summary judgment is sought and all doubts are to be resolved against the moving party"). Finally, this Court has the authority 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).

Argument

I. NO WATER RIGHT CAN BE RECOGNIZED IN PURDAM DRAIN.

Janicek claims to be entitled to a water right because Purdam Drain (called Purdam Gulch Creek by Janicek) "is and was a natural water course" prior to Reclamation's construction of the drain. MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT at 7 (MEM. IN SUPP.). Janicek is simply wrong in claiming that Purdam Drain was a natural water course prior to Reclamation's construction. Even if some form of channel may have existed

downstream of the present site of Janicek's diversion, no natural waterway existed at the site prior to Reclamation's construction of the drain.

A report done by A.D. Foote² in 1887, REPORT ON THE IRRIGATING AND RECLAIMING OF CERTAIN DESERT LANDS IN IDAHO AND OTHER PROJECTS CONNECTED THEREWITH, described the area where the Boise Project is now located as desert lands with limited vegetation. It explained that the main stream channels in the area of Janicek's claim – Indian, Ten Mile and Five Mile Creeks – contained water “for a month or two only in the early spring, and [were] dry for the remainder of the year.” REPORT at 17. The report also included a sketch of “natural drainage channels” existing at that time. Although the proposed laterals shown in the sketch reached the area of Janicek's claim, no “natural drainage channel” is shown there. *Id.* at 43.

Construction of the Ridenbaugh Canal and other features of the Boise Project rapidly changed the character of the land surrounding the claim site as seepage and return flows waterlogged the land. The 1915 contract relied on by Janicek explained that “the groundwater table is rising in the District [NMID] and in places is already close to the surface.”³ Contract at 2, Exhibit C to the AFFIDAVIT OF MICHAEL LAWRENCE. Photos of the construction of Purdam Drain in 1914 show that even several miles downstream from the claim site the land was a flat and featureless marsh covered by cattails.⁴ See Exhibits H and I to the AFFIDAVIT OF JERRY

² Foote is generally regarded as the father of large scale irrigation in the Boise Valley. See <http://www.idahohistory.net/Reference%20Series/0190.pdf>.

³ Modeling by hydrologist Robert Schmidt confirms what is apparent from the historic record: but for “canal seepage and on-farm infiltration from Boise Project and non-project NMID lands” there would be no reliable water supply at the claim site. AFFIDAVIT OF ROBERT SCHMIDT at ¶ 8.

⁴ The photos are of the construction of the initial segment of the Purdam drain within the Pioneer Irrigation District. That construction stopped at the Phyllis Canal. See Exhibit F to the AFFIDAVIT OF JERRY GREGG. NMID and Reclamation then entered into the 1915 contract which provided for the extension of Purdam drain into NMID's lands. Construction of the extension

GREGG. None of those photos show any evidence of a natural water course. Nor do any of the maps accompanying Reclamation's annual reports or any other historic record maintained by Reclamation show evidence of a natural water course prior to the construction of Purdam Drain. AFFIDAVIT OF JERRY GREGG at ¶ 12.

The only evidence Janicek cites to support its claim that a natural water course existed prior to construction of the drain is a cost estimate attached to the 1915 contract between Reclamation and NMID which provided for the construction of a drainage system. That contract addressed the construction of a series of drainage systems that included 13 ditches spanning more than 50 miles in length.⁵ Estimate of Cost at 5, included within Exhibit C to the AFFIDAVIT OF MICHAEL LAWRENCE. The estimate of costs includes a list of "proposed ditches" that "will follow the natural drainage courses as closely as feasible, and these channels will be straightened and deepened." *Id.* at 1.

Although Purdam Gulch is included on that list, the list does not establish that a natural water course existed at the claim site prior to the construction of Purdam Drain for two reasons. First, given the lack of reference to a channel or gulch at the claim site on any map prior to the beginning of the construction of the drainage system in 1913, the reference to "these channels" in the list should be read as a general reference to channels where they existed, not as an affirmative statement that channels actually existed along the entire course of the proposed ditches.

took place in 1916. *See* Exhibit G to the AFFIDAVIT OF JERRY GREGG.

⁵ The contract also addressed ownership of the water within the ditches to be constructed. It provided that "[t]he right to water developed in the drainage system herein provided for shall belong to the Boise Project and the old water right lands of the District [i.e., NMID's land located outside the Project]. Contract at 7, Exhibit C to the AFFIDAVIT OF MICHAEL LAWRENCE.

Second, even assuming that some form of natural gulch or channel existed at the time the drain was constructed, both the historic documents and the modeling of the water table discussed above demonstrate that there was no natural flow at the claim site. Instead, any water that may have been present derived from irrigation within the Boise Project and NMID's non-project land. In short, there is no viable evidence of a natural water course at the claim site prior to Reclamation's construction of the drain.

The Idaho Supreme Court held that there can be no appropriation of water from a constructed drain in *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). Specifically, the court ruled that

where there has been no appropriation of waste or seepage water *prior to 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. § 5562 [now I.C. § 42-107].”

258 P. at 178 (emphasis added). The rationale for that rule is rooted in fairness: a later potential water user should not be allowed to enjoy a “free ride” on the original appropriator's efforts and expense in constructing the drain and collecting the wastewater.

There is no question that Purdam drain collects wastewater. Indeed, Janicek appears to concede the point.⁶ MEM. IN SUPP. at 9 (“Much of the water in Purdam Gulch Creek may derive from seepage or return flows from irrigation deliveries”). To the extent Janicek does not concede the water is wastewater, both historic documents and the hydrologic evidence noted above establish that essentially all of the water claimed by Janicek is wastewater. *E.g.*,
AFFIDAVIT OF ROBERT SCHMIDT.

⁶ Janicek also concedes that appropriations of wastewater are subject to legal limitations. As Janicek explains, “NMID, BOR or their consumers could undertake efforts to prevent seepage and other incidental return flows and Janicek could not complain.” MEM. IN SUPP. at 12 n.7.

Janicek argues that the wastewater it claims to have appropriated has lost its status as wastewater because it “has become part of the public waters by virtue of having been commingled with waters of natural watercourses and the aquifer.” MEM. IN SUPP. at 12. That argument cannot succeed for two reasons.

First, as shown above, the drain reach at the claim site is not a natural water course and therefore water within the drain is not “public water” subject to appropriation. Moreover, Janicek has yet to provide any evidence of a source of water for the drain other than irrigation wastewater and this Court has no basis for finding that non-wastewater is present.

Second, even assuming *arguendo* there is some small quantity of natural water flowing in the drain, more than 80 years ago the United States District Court for the District of Idaho clarified that commingling wastewater with other water does not change its character.⁷ *United States v. Haga*, 276 F. 41 (D. Id. 1921). Idaho courts have long followed that rule. *E.g. Sebern*, 44 Idaho at 17-18, 258 P. at 178 (citing *Haga*). The Idaho Supreme Court recently reiterated that commingling water does not change its character in its decision in *A & B Irrigation*. Although, as Janicek notes, the court affirmed then-Presiding Judge Burdick, it did not accept all of his reasoning. In particular, it rejected the very proposition Janicek relies on. *Cf.* MEM IN SUPP. at 11.

The Idaho Supreme Court began its discussion of the issue by noting that under the rationale applied by the trial court, as well as that of the court’s own prior decision in *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755 (1954), groundwater captured and commingled with wastewater in a drain would lose its character as groundwater and be treated as wastewater. *A & B Irrigation*, 141 Idaho at 751, 118 P.3d at 83. The court then expressly

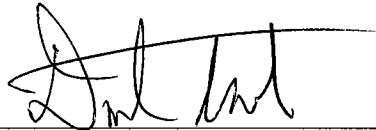
⁷ *Haga* arose on Eight Mile Creek within the Boise Project, just a few miles southeast of the claim site.

rejected the proposition that commingling water changes its nature. Instead, as the court explained, “[t]o the extent that the source of appropriated water can be identified it retains that characterization.” 141 Idaho at 753, 118 P.3d at 85. Thus, even assuming *arguendo* that there is some “natural” water in the drain, as a matter of law the wastewater in the drain remains wastewater.

Conclusion

Janicek claims to have initiated his appropriation in 1951, decades after Reclamation constructed the drain which collects the wastewater he claims to have appropriated. Consequently, the water Janicek claims is not subject to appropriation and the motion for summary judgment must be denied.

DATED this 14th day of March, 2008.



David W. Gehlert, Trial Attorney
Natural Resources Section
United States Department of Justice
Environment and Natural Resources Div.
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Phone: (303) 844-1386
Counsel for the United States of America

CERTIFICATE OF MAILING

I certify that on March 14, 2008, I served true and correct copies of the foregoing **UNITED STATES' OPPOSITION TO JANICEK PROPERTIES' MOTION FOR SUMMARY JUDGMENT** as follows:

via Facsimile:

Clerk of the District Court (Original)
Snake River Basin Adjudication
Phone: 208-736-3011
Fax: 208-736-2121

Idaho Department of Water Resources
Document Depository
Fax: 208-287-6701

via e-mail transmission:

Michael P. Lawrence
Givens Pursley, LLP
E-mail: michaellawrence@givenspursley.com

S. Bryce Farris
Ringert Clark Chartered
E-mail: bryce@ringertclark.com

U.S. Department of Justice
Environment and Natural Resources Division
E-mail: gloria.baimbridge@usdoj.gov

A handwritten signature in black ink, appearing to read 'David W. Gehlert', written over a horizontal line.

David W. Gehlert