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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 No. 63-27475

**JANICEK PROPERTIES, LLC's,
REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

This memorandum presents Janicek Properties, LLC's ("Janicek"), reply to responses filed by Nampa & Meridian Irrigation District ("NMID") and the U.S. Bureau of Reclamation ("BOR"),¹ to Janicek's Memorandum in Support of Motion for Summary Judgment ("Janicek Initial Memo").

INTRODUCTION

This subcase contrasts two important Idaho water law policies; the first is the policy requiring maximum beneficial use of the State's waters, and the second is the policy that abhors any attempt to hoard water by those who do not put it to beneficial use. This subcase arises from

¹ NMID's and BOR's Response Memorandums are referred to herein as the "NMID Memo" and "BOR Memo," respectively.

yet another legal challenge by senior-priority water delivery entities asserting “ownership” of Idaho’s public waters as against other claimants without regard to the Constitutional and statutory mandates requiring that appropriations of public waters are put to beneficial use.²

Ninety-three years ago, BOR went onto what historically has been variously referred to as Purdam Gulch or Purdam Slough, or Purdam Slough Drain, or Purdam Drain or Purdam Gulch Creek (hereafter “Purdam Gulch Creek”), and made extensive excavations to induce the drainage of water-logged lands within the boundaries of the federal Boise Project and NMID. Water that historically occurred in the area of these excavations was thereafter augmented by the induced drainage and those commingled waters have, but for the Janicek diversion, flowed essentially unimpeded downstream into Mason Creek, and ultimately into the Boise River for nearly a century. Except for NMID’s alleged diversion from Purdam Gulch Creek of an unknown quantity of water to a fourteen-lot subdivision that was not even platted until the late summer of 2002, and a vaguely described cross-diversion of water from Purdam Gulch Creek to NMID’s Kennedy Lateral, neither NMID nor BOR have presented *any* evidence even hinting that either of them ever have beneficially used all of the water flowing in Purdam Gulch Creek.

Despite approximately a century of *non-use* of the waters of Purdam Gulch Creek by the NMID and BOR, and despite Janicek’s undisputed fifty-six years of *actual* beneficial use of Purdam Gulch Creek waters, NMID is comfortable asserting that it “owns” all of the water in

² See e.g., *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (challenging, inter alia, IDWR authority to confirm actual beneficial use of water by calling senior before curtailing juniors); *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (stating that, rather than hoarding non-beneficially used water, irrigation districts must divert less water); *State v. Hagerman Water Right Owner’s, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997) (rejecting assertion that no portion of a water right is forfeited so long as some portion of it is beneficially used.)

Purdam Gulch Creek, and that as against all others who would use the water, NMID can hold that water without use indefinitely.

Presumably standing on the thinnest ledge of a 2001 quitclaim deed from BOR, NMID goes on to assert exclusive ownership of Purdam Gulch Creek across Janicek's property. In its zeal to sweep up as much "title" as it can carry in both arms, NMID forgets even the statute enacted in 1996 *for its own benefit* (Idaho Code 42-1102) providing that the existence of a canal, ditch or conduit (i.e., Janicek's pump) constitutes notice that the owner of the canal, ditch or conduit (i.e., Janicek) has a right-of-way and all rights incident thereto. Whatever BOR purported to convey without any warranties of title to NMID in 2001, it was accepted by NMID subject to Janicek's pre-existing rights. No facts have been presented by NMID or BOR to support NMID's claim of ownership of Purdam Gulch Creek, let alone facts that might rise to a level that would preclude summary judgment for Janicek.

NMID incorrectly asserts that the premise of Janicek's claim is that Janicek has made an appropriation from a natural water course. And both NMID and BOR have made a considerable attempt to create disputed facts on this issue. The undisputed substantial facts show Purdam Gulch Creek to be a natural water course. But to be very clear, as a matter of law, Janicek's appropriation is valid regardless of whether Purdam Gulch Creek is a natural water course. Idaho Code Section 42-101 confirms the right to appropriate the waters "flowing in their natural channels." The complement to that statute is Idaho Code Section 42-107, which confirms the right to appropriate waste, seepage and spring waters wherever they arise under "the same laws relating to priority of right" as appropriations of the waters of running streams.

Whatever NMID's or BOR's rights might be with respect to operation and maintenance of Purdam Gulch Creek as a drain—an issue not properly raised in the SRBA—cases such as

Sebern and *Haga*, discussed herein, confirm that such waste, seepage and spring waters are *public waters* subject to appropriation under I.C. Section 42-107. NMID's contracts with BOR, in which they purport to allocate between themselves their respective interests in water that might accrue in constructed drains, cannot alter these statutory rights to appropriate, or the bedrock requirement that beneficial use is the basis and limit of a water right or otherwise diminish the rights of a third party such as Janicek who has diverted water to beneficial use under the laws of this State.

NMID's water rights allow it to divert water from the Boise River through its canals and ditches to its patrons for irrigation. Idaho cases such as *Hidden Springs*, *Sebern* and *Haga* discussed further below, tell us that NMID's water right also includes the right to cease wasting, to reduce or eliminate seepage and to recapture water for beneficial use on the original lands for which the water right was appropriated. But NMID's incidental right to recapture water is inextricably tied to NMID's fundamental obligation to beneficially use it. NMID cannot claim and hoard water in the Boise River under its water rights any more than it can claim and hoard waste or seepage water in a drain or elsewhere, without demonstrating that every portion claimed as against someone else is beneficially used. NMID has not, and cannot demonstrate that in this case.

UNDISPUTED FACTS

The following facts are undisputed:

- (1) NMID does not "own" Purdam Gulch Creek;
- (2) In 1915, NMID and BOR admitted that Purdam Gulch Creek was a "natural drainage course" that would be "straightened and deepened" for drainage purposes.

(3) Purdam Gulch Creek contains a combination of natural flows and waste and seepage waters.

(4) NMID does not put to beneficial use all of its waste and seepage waters that collect in Purdam Gulch Creek.

ARGUMENT

NMID and BOR have not met their burden of showing that Janicek is not entitled to the water right recommended by IDWR. As the non-moving parties in this summary judgment proceeding, it is their burden to overcome the presumption created by IDWR's recommendation. "The director's report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law." *In re SRBA Case No. 39576, Subcase No. 63-08447 ("Kandler")*, *Memorandum and Order on Motion for Summary Judgment*, slip op. at 10 (Aug. 28, 2007), *citing* Idaho Code § 42-1411(4)-(5). "The objecting party has the burden [of] going forward with evidence to rebut the presumption established by the director's report. This presumption is overcome when the 'opponent produces substantial evidence of the nonexistence of the fact [presumed].'" *Id.* at 10-11 (*quoting Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986)).

IDWR's recommendation for the Janicek right finds the source of water to be Purdam Gulch Creek. NMID and BOR have not provided substantial evidence of the non-existence of this fact presumed by the recommendation. NMID and BOR cannot show that Purdam Gulch Creek is not a natural watercourse or that it does not contain public waters subject to appropriation, either of which, as a matter of law, is fatal to their case. Even if they could show that Purdam Gulch Creek is not a natural watercourse, however, it would not preclude Janicek's recommended appropriation under Idaho law. NMID and BOR have not shown NMID "owns"

either Purdam Gulch Creek or the water within it. They have raised no genuine issues of fact and cited no provision of law preventing this Court from decreeing Janicek the water right recommended by IDWR.

I. THE SOURCE OF WATER FOR THE JANICEK RIGHT IS PURDAM GULCH CREEK.

NMID and BOR have not produced substantial evidence that Purdam Gulch Creek is not a natural watercourse. (*Kandler*, slip op. at 10-11.) They cannot, therefore, rebut the presumptive weight of IDWR's recommendation or the substantial evidence offered by Janicek showing that Purdam Gulch Creek is a natural watercourse. As such, and in accordance with Idaho law, Janicek is entitled to appropriate its waters.

NMID and BOR rely on a report prepared by A.D. Foote in 1887 as their primary evidence on this issue. (Aff. of B. Farris, Ex. A ("Foote Report").)³ NMID asserts that Purdam Gulch Creek historically was not a natural watercourse because the Foote Report does not mention it by name as a "main" drainage channel. (NMID Memo at 4). Their intended implication seems to be that only those streams specifically named in the Foote Report actually existed in the Boise Valley. Elsewhere in the Foote Report, however, the author acknowledges the existence of "a number of natural drainage channels" lying west of Ten Mile Creek (i.e., where Purdam Gulch Creek runs). (*Foote Report* at 45.)⁴ On this point then, the Foote Report at

³ Foote's report was prepared for the Idaho Mining and Irrigation Company, ostensibly to attract investors to fund development of irrigation projects in Idaho. The report is laced with statements of hyperbole, such as "with reasonable care in laying out the irrigating channels, not an acre of land need be lost in swamp or alkali; neither need there be a drop of water allowed to run to waste in drainage channels." (*Foote Report* at 18 (emphasis added).) Propaganda such as this was infamously portrayed in *Angle of Repose*, Wallace Stegner's novel chronicling the failure of the early speculative irrigation projects in the Boise River valley. The Foote Report is of historical interest primarily as an example of promotional literature of the day.

⁴ "The channel of Indian Creek is narrow, deep, and in rock; it will, therefore, not be available as a branch canal [for delivering water]. There are, however, a number of natural drainage channels leading from the Main Canal line, between Ten-Mile Creek and the end of the Main Canal, which will be used for the purpose." (*Foote Report* at 45.)

least documents that water courses other than the few proposed to be incorporated into an irrigation distribution system—courses such as Purdam Gulch Creek—existed in 1887.

NMID and BOR also both quote (without further explanation) Foote’s statement that the main drainage channels in the area “are creeks for a month or two only in the early spring, and dry for the remainder of the year.” (NMID Memo at 4; BOR Memo at 3 (*citing Foote Report* at 17).) If NMID and BOR mean for this quotation to show that Purdam Gulch Creek is not a natural watercourse containing public waters subject to appropriation, they are wrong. It is well-settled that a water course with no more than springtime flows is a natural watercourse upon which water rights may be established. *See U.S. v. Haga*, 276 F. 41, 45 (D. Idaho 1921).

Haga involved a dispute over waste and seepage waters in Eight Mile Creek, a tributary of the Boise River located “just a few miles southeast” of Purdam Gulch Creek. (BOR Memo at 6, n.7.) The *Haga* court found that

during the early springtime at least, Eight Mile creek received a little water from the natural drainage, but it is further to be conceded that after the commencement of the irrigation season most of the water flowing in the channel . . . has its source in surface waste and seepage incident to the use of water from the government canals in the irrigation of lands lying along or near the creek above the defendant’s point of diversion . . .

[T]here is no showing that naturally during the irrigation season, it actually makes a contribution to the river flow. There is a continuous channel, it is true, and there are doubtless short periods of unusual run-off in extraordinary seasons when there is a discharge to the river. . .

[S]ubstantially all of the water in the creek during the irrigation season comes from plaintiffs canals by the way of surface waste from irrigated fields and the seepage of percolating waters from the same source . . .

From the evidence as a whole the conclusion is irresistible that the stream in its natural state is not dependable as a source of irrigation even in May, and generally speaking after May, the creek is only a dry channel.

Haga, 276 F. at 42-43. Yet on these facts, the *Haga* court had “no hesitation in holding without discussion that Eight Mile Creek is a natural water course or channel.” *Id.* at 45.⁵ The facts presented to rebut the presumption that Purdam Gulch Creek is a natural watercourse (i.e., that virtually all of the water in Purdam Gulch Creek derives from waste or seepage or return flow) instead comport with facts in *Haga* that supported the conclusion that Eight Mile Creek was a natural watercourse, and they do not rebut IDWR’s recommendation.

BOR also cites Foote’s “sketch” on page 43 of the report as evidence that Purdam Gulch Creek is not a natural watercourse. A “sketch” is precisely what this document is. By no means is it a detailed or comprehensive representation of the landscape in 1887.⁶ This sketch is a schematic drawing of proposed laterals radiating from Ten-Mile and Five-Mile Creeks—a conveyance system that notably never came to pass. This sketch is not any evidence, let alone substantial evidence, to rebut the presumption that Purdam Gulch Creek is a natural watercourse.

BOR asserts that the *lack* of maps depicting Purdam Gulch Creek in its annual reports and other historical records establishes that it is not a natural watercourse. This *absence* of evidence in its own records hardly proves the non-existence of such maps elsewhere or that Purdam Gulch Creek is not a natural channel. BOR’s affiant, Mr. Gregg, does not say that BOR

⁵ The *Haga* Court might as well have been quoting the R. Schmidt Affidavit proffered by the BOR, which is apparently intended to establish the same kind of hydrologic facts for Purdam Gulch Creek that the *Haga* Court found to be consistent with the existence of a natural water course. Mr. Schmidt acknowledges that some of the water in Purdam Gulch Creek is not NMID’s waste or seepage waters. Mr. Schmidt states that “essentially all,” not all, of the water in Purdam Gulch Creek is waste or seepage waters. (Aff. of R. Schmidt, ¶ 10.) Indeed, Mr. Schmidt admits that “[e]liminating irrigation activity . . . reduced drain flow at [Janicek’s point of diversion] . . . to 0.3 cfs.” (Aff. of R. Schmidt, ¶ 7.) It is therefore undisputed that some of the water in Purdam Gulch Creek is not NMID’s waste or seepage waters.

⁶ Foote’s sketch is entitled “Sketch showing the Distribution of Water by Means of Natural Drainage Channels and Lateral Canals.” The title makes clear that the only features Foote intended to show were those natural drainage channels referenced in his text that were intersected by and potentially suitable for distributing live irrigation water from the “Main Canal.” Consequently, the sketch does not depict natural channels that did not meet these criteria such as Indian Creek (mentioned by Foote as “much the largest” of the creeks (Foote Report at 17) but unsuitable to convey irrigation water (*Foote Report* at 45)) or others such as Purdam Gulch Creek.

has no such records, only that he is “not aware of any.” (Aff. of J. Gregg, ¶ 12.) In any event, Mr. Gregg admittedly does not have plenary knowledge of all of BOR’s documents—he is “familiar with many” but not all of BOR’s records. (*See id.* at ¶ 2.) It further must be conceded that Mr. Gregg does not have plenary knowledge of all documents or maps in existence that might describe or depict the Purdam Gulch Creek area. BOR’s non-existent maps and records cannot rise to the level of substantial evidence of the non-existence of Purdam Gulch Creek as a natural watercourse. It cannot overcome the presumption created by IDWR’s recommendation.

The photographs proffered by BOR are equally unpersuasive.⁷ First, these photographs are not of Purdam Gulch Creek near Janicek’s property; BOR admits that they were not even taken within NMID’s boundary (they were taken within the Pioneer Irrigation District). (BOR Memo at 3, n.4.) They therefore tell the viewer nothing about Purdam Gulch Creek in the vicinity of the Janicek property. What they do show, if anything, is this: A dredge situated on top of a bank covered with cattails from which a stream of surface water meanders and cascades into a newly excavated trench (Aff. of J. Gregg, Ex. H.); and a dredge (perhaps the same one from a different angle) on top of a bank covered with cattails with an excavated trench filled with water in the foreground. (Aff. of J. Gregg, Ex. I). If these photographs establish anything, it is that surface water was present in the area where the photographs were taken when dredging commenced. Anything else would be speculation.

BOR and NMID cannot explain away their admission in the 1915 contract signed by both parties that Purdam Gulch Creek was a “natural drainage course.” (Aff. of M. Lawrence, Ex. C) NMID does not address this at all, and BOR attempts to dismiss the contract’s specific language

⁷ Janicek does not waive its right to object to the admission of these photographs or any other evidence preferred by NMID or BOR on various grounds including of lack of foundation and relevance.

as a “general reference” that (for reasons unexplained) should not be read to mean what it says. BOR’s self-serving denial now in the context of this litigation of a statement it made in 1915 is unpersuasive. Nor does BOR’s response on this point contradict the only affirmative evidence presented to this Court regarding Purdam Gulch Creek’s status as a natural watercourse.

In summary, NMID and BOR have not offered substantial evidence to rebut the presumption created by IDWR’s recommendation that Purdam Gulch Creek is a natural watercourse. NMID and BOR have offered no affirmative proof and have not offered any substantial evidence of the nonexistence Purdam Gulch Creek. On the other hand, IDWR’s recommendation is that the source of Janicek’s right is Purdam Gulch Creek, and Janicek has provided affirmative proof in the form of an admission by both NMID and BOR in 1915 that Purdam Gulch Creek was a natural drainage course prior to being straightened and deepened to facilitate drainage.

II. REGARDLESS OF WHETHER PURDAM GULCH CREEK IS A NATURAL WATERCOURSE, JANICEK IS ENTITLED TO A WATER RIGHT AS A MATTER OF LAW.

It would be easy to get wrapped up in speculation about what the absence of maps in BOR files might mean, or whether or how historical photos showing flowing water in one location might be used to extrapolate what circumstances existed several miles away nearly one hundred years ago. But speculation on these points is all one might do. That is not enough to meet NMID’s or BOR’s burden here. As Janicek already has argued, even if Purdam Gulch Creek was not a natural watercourse, Janicek is entitled to a water right as recommended by IDWR because Idaho Code Section 42-107 allowed Janicek’s predecessors to appropriate waste, seepage and spring waters wherever they might arise, particularly those that arise on Janicek’s property.

NMID argues that Janicek has trespassed on Purdam Gulch Creek and the water within it. This is incorrect as a matter of fact and a matter of law. NMID and BOR offer no evidence whatsoever to support allegations that NMID holds exclusive rights to the bed and banks of Purdam Gulch Creek. Moreover, NMID does not “own” the water in Purdam Gulch Creek—as a matter of law, those waters belong to the state and are subject to appropriation.

A. Janicek has not trespassed because NMID does not “own” Purdam Gulch Creek.

There is no basis for NMID’s and BOR’s assertions that NMID “owns” Purdam Gulch Creek. (*See* NMID Response at 6, 7, and 9; BOR Response at 2.) As discussed in Janicek’s opening memorandum, Janicek holds record fee title to the property through which Purdam Gulch Creek passes and on which Janicek’s point of diversion is located. (Janicek Initial Memo at 5-6.) Neither NMID nor BOR have pointed out in their responsive briefing any recorded documents establishing NMID’s ownership of any portion of Janicek’s property. NMID has not argued or presented any facts to suggest that it holds title to Janicek’s property through adverse possession.⁸ “The party opposing a motion for summary judgment may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertions of the moving party.” (*Kandler*, slip op. at 5 (citation omitted).) Given the indisputable facts presented by Janicek, and NMID’s and BOR’s failure to produce any evidence whatsoever on this issue, NMID cannot be found to “own” the bed and banks of Purdam Gulch Creek within the boundaries of Janicek’s property.

⁸ In addition to the requirements of I.C. § 5-210, the elements of adverse possession include that the possession has been actual, open, visible, notorious, continuous and hostile to the party against whom the claim is made. *Luce v. Marble*, 142 Idaho 264, 272, 127 P.3d 167, 175 (2005).

NMID and BOR do not explain the nature or source of interest, if any, NMID holds to the portion of Purdam Gulch Creek that crosses Janicek's property. As mentioned in the Janicek Initial Memo at 6-7, it is conceivable that NMID holds a prescriptive easement across Janicek's property for conveying drainage water away from its irrigated lands.⁹ If so, NMID must have derived it by virtue of BOR, which was the entity that excavated the channel, and presumably operated and maintained it before quitclaiming whatever interest BOR had to NMID in 2001. Whatever interest BOR had and that NMID may have acquired, it was subject to Janicek's existing rights.

Idaho Code 42-1102 provides among other things, that

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

Janicek's diversion system or "conduit" has been in existence since at least 1951, fully fifty years before BOR purported to convey any interest it had in Purdam Gulch Creek to NMID. NMID accepted that interest, if any, subject to the rights confirmed or granted by Section 42-1102.

And even if NMID holds a prescriptive easement, Janicek has committed no trespass because that easement cannot be entirely exclusive. "Under Idaho law, trespass is the 'wrongful interference with the right of exclusive possession of real property.'" *Luce v. Marble*, 142 Idaho 264, 274, 127 P.3d 167, 177 (2005) (quoting *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 541, 96 P.3d 637, 642 (2004)). There is no such thing as an easement of exclusive possession.

⁹ Janicek does not concede this point. NMID argues that under Idaho Code Sections 42-1208 and 42-1209, Janicek is required to obtain NMID's consent to divert water from within a NMID easement. However, the enactment of these statutes post-dates Janicek's diversion of water from Purdam Gulch Creek by 30 years (in the case of 42-1208) and 53 years (in the case of 42-1209). Thus, to the extent that Janicek's diversion works encroach on a NMID easement, these statutes are inapplicable.

Luce, 142 Idaho at 273, 127 P.3d 176 (citing *Drew v. Sorensen*, 133 Idaho 534, 541, 989 P.2d 276, 283 (1999); *Viebrock v. Gill*, 125 Idaho 948, 953, 877 P.2d 919, 924 (1994) (“An unlimited easement is virtually a conveyance of ownership, rather than an easement.”). So, even if NMID holds an easement, it is not and cannot be an easement of exclusive possession, and Janicek has therefore not committed a trespass.¹⁰

No caselaw cited by NMID changes this conclusion. Both *Idaho Power Co. v. City of Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941) and *Jones v. McIntire*, 60 Idaho 338, 344, 91 P.2d 373 (1939) recite the general rule that a water right cannot be initiated in trespass upon private lands.¹¹ As discussed, however, Janicek has not trespassed on private lands.

Similarly, *Rabido v. Furey*, 33 Idaho 56, 62, 190 P. 73 (1920), is inapposite to this case. The *Rabido* Court recited what it called a “generally recognized principle that a valid water right cannot be initiated by using another’s ditch against his will, or by any other trespass,” but it did so only in passing. The *Rabido* Court did not rely on this proposition in reaching its holding, and no other reported case citing *Rabido* has relied on this statement or attempted to interpret it. The only reported case that might be considered as relying on this statement (albeit, without citing or quoting it directly) is *Washington County Irr. Dist. v. Talboy*, 43 P.2d 943, 946 (1935). In *Talboy*, the Idaho Supreme Court cited *Rabido* for the proposition that “No one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or

¹⁰ Similarly, if NMID’s “trespass” allegation is viewed in easement law terms, NMID has not shown that Janicek has unreasonably interfered with its easement.

¹¹ For reasons that are completely unrelated to Janicek’s claim, the Supreme Court in *Idaho Power* and *Jones* held that no trespasses occurred. In *Idaho Power*, where information necessary to apply for a water right permit on another party’s land was obtained through observation beyond the premises and not by physical entry onto the premises, the Court upheld the water right permit because a trespass “must be physical, not merely mental.” In *Jones*, where the waters of springs naturally flowed across another party’s private lands onto the claimant’s lands, the Court held that claimant’s water right was valid because it was established without trespassing on the upstream property owner’s lands.

conveyed are already diverted and appropriated and are no longer ‘public waters.’”¹² The *Talboy* Court made this statement, however, in the context of analyzing the scope of a reservoir or canal owner’s ownership rights in the diverted water; specifically, whether the owner was entitled to withhold water from patrons who apply to rent it (the Court answered this question in the negative). This interpretation is not applicable to the present case.¹³ Also, review of the authorities cited by *Rabido* shows it is merely an extension of the general rule stated in *Idaho Power* and *Jones* that a water right cannot be initiated in trespass upon private lands. That is, one cannot take water from an irrigation ditch *owned* and used by another to convey irrigation water for beneficial use without the other’s consent because doing so would constitute a trespass.

B. Janicek has not trespassed because NMID does not “own” the water in Purdam Gulch Creek.

The rationale by which NMID claims ownership of the water in Purdam Gulch Creek is contrary to Idaho law regarding water rights and the appropriation of waste and seepage waters. NMID asserts that it “owns” the waters in Purdam Gulch Creek because it paid for the construction and enlargement of drains within its boundaries, because a contract with BOR provided NMID with the right as against BOR to the water developed or captured in the drains, and because NMID allegedly owns, operates, and maintains the drains. None of these actions, however, give NMID “ownership” of the waste and seepage waters that collect in Purdam Gulch Creek. The only ownership right one can obtain in the state’s waters is ownership of the right of

¹² Here of course is why NMID’s suggestion that Janicek’s diversion is tantamount to sticking a straw into the Ridenbaugh Canal is incorrect. NMID’s patrons presumably beneficially use all the water delivered through the Ridenbaugh, a fact that does not exist with respect to Purdam Gulch Creek.

¹³ Notably, the *Rabido* Court also found that water impounded in a reservoir becomes “the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.” *Id.* at 945. Thus, the *Rabido* Court explained a diverter’s ownership rights in waters are limited by its obligation under the public trust to apply the water to a beneficial use.

beneficial use upon making a valid appropriation. *Coulson v. Aberdeen Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P. 29 (1924) (The waters of this state belong to the state and the right to the beneficial use thereof is all that can be acquired). NMID has presented no facts suggesting it beneficially uses water from Purdam Gulch Creek in any quantity that might preclude Janicek's diversion and use.

The law concerning waste and seepage water has been stated many times: “[S]urface waste and seepage water may be appropriated . . . 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.” *Hidden Springs Trout Ranch, Inc., v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980) (emphases added); *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945); *Sebern v. Moore*, 44 Idaho 410, 416, 417, 418, 258 P. 176, 178 (1927).

The right to appropriate waste and seepage water is codified in Idaho Code Section 42-107, which states

All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams.¹⁴

The Idaho Supreme Court recently confirmed that this statute authorizes appropriations of waste and seepage waters in drainage facilities. *See A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 750, 118 P.3d 78, 82 (2005) (“the Court has recognized that

¹⁴ Idaho's water right permitting statutes also recognize the right to appropriate seepage water. *See* I.C. § 42-202 (“any person . . . intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters . . . or other public waters in the state of Idaho, shall . . . make an application to the department of water resources for a permit to make such appropriation” (emphasis added)).

drain, waste and seepage waters may be appropriated and put to beneficial use.”) (*citing* Idaho Code § 42-107; *Hidden Springs Trout Ranch*, 101 Idaho at 680, 619 P.2d at 1133; *Colthorp*, 66 Idaho at 179, 157 P.2d at 1007; *Sebern*, 44 Idaho at 418, 258 P. at 178).

These cases and statutes make clear that one can establish a water right in another’s so-called waste and seepage water regardless of whether the diversion is initiated from a natural stream. Indeed, the statute contemplates that the diversion will not be from a natural stream, but provides that prior appropriation laws will apply as if it were. This is because these waters are deemed public waters. *See Haga, supra*; I.C. § 42-202.

Of course, the Idaho cases also make clear that such water rights relying in whole or in part on waste or seepage are subject to the rights of the “paramount owner,” to cease wasting, but only “so long as [the paramount owner] applies it to a beneficial use.” *Hidden Springs*, 101 Idaho at 680, 619 P.2d at 1133. NMID and BOR would like this court to rule that NMID is the paramount owner of not only the water it diverts from the Boise River, but also all water in Purdam Gulch Creek even if it does not put it to beneficial use (which it does not) and to rule that, despite this non-use, NMID can preclude others from obtaining water rights in its waste and seepage waters.¹⁵ This, however, is not the law in Idaho.

NMID and BOR rely on the final sentence of *Sebern* for the proposition that “[w]here there has been no appropriation of waste or seepage water prior to the construction of the drain in

¹⁵ NMID cites a 1981 memorandum from former IDWR Director A. Kenneth Dunn as support for its position that NMID can preclude others from appropriating waste and seepage waters (or any waters, for that matter) within its boundaries. (NMID Memo at 7; Aff. of B. Farris, Ex. B.) On its face, however, this memorandum is simply an informal guidance document setting forth internal agency policies for ease of administration. The memorandum is devoid of citation to legal authority, and it is unclear whether its policies are still employed by IDWR or if they ever officially were at all. Moreover, the memorandum discusses policies when reviewing applications to appropriate water as of 1981—30 years after Janicek’s predecessors began diverting and using water from Purdam Gulch Creek. In short, the policies contained in the memorandum are inapplicable to this Court’s determination in this matter. (We nevertheless note that the memorandum expressly acknowledges that waste and seepage waters from constructed drains are subject to appropriation.)

which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under [I.C. § 42-107].” *Sebern*, 44 Idaho at 418-19, 258 P. at 178. This statement, however, is *dictum*. It was not necessary for the determination of *Sebern* because, in that case, an appropriation of waste or seepage water had been made prior to construction of the drain. This language’s lack of authority is underscored by the fact that it has not been relied upon in any reported appellate case since. Finally, unless the Court in *Sebern* was assuming that the owner of a drain was beneficially using the water that collected there, this lone statement—never again cited by an Idaho court—is irreconcilable with an uninterrupted line of Idaho cases prohibiting one who does not beneficially use water from precluding others from exercising their rights to its use. The most recent decision in this regard was *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 154 P.3d 433, 450 (2007) (“AFRD #2”), which reaffirmed that irrigation districts may not waste or unnecessarily hoard water without putting it to some beneficial use.

Save one narrow exception not applicable here,¹⁶ all waters in the state are public waters subject to appropriation. It is well-settled that waste and seepage waters are public waters. As stated by the Court in *U.S. v. Haga* in construing the language in I.C. § 42-107, “whatever may be the classification of the water source, the water must belong to the state. It must be public water subject to appropriation.” *Haga*, 276 F. at 44. However much waste and seepage water collects in Purdam Gulch Creek, it is public water subject to appropriation.

Moreover, all public water—including so-called waste and seepage water—is “impressed with the public trust to apply it to a beneficial use.” *AFRD #2*, 154 P.3d at 450. Put another

¹⁶ Idaho Code Section 42-212 defines private waters as “the waters of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation.”

way, any right to appropriate water is valid only to the extent that the water is put to beneficial use. *See U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, ___, 157 P.3d 600, 604 (2007) (“In Idaho it is a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.” (quotation marks omitted)). Beneficial use, it has been said, is the basis, measure and limit of the right to public waters. *Id.* at ___, 157 P.3d at 604-06. *See also* I.C. § 42-104 (“The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.”)

None of the actions cited by NMID—construction, enlargement, operation or maintenance of a drainage system, or entering a contract with BOR—is enough to create an ownership interest in waste or seepage water that collects in Purdam Gulch Creek because those actions do not put water to beneficial use. There is no evidence that NMID has or has ever intended to put all of the waste and seepage water that collects in Purdam Gulch Creek to beneficial use.¹⁷ Indeed, all evidence suggests that the majority of water in Purdam Gulch Creek attributable to NMID’s waste and seepage is not used by NMID at all. Without using the waste and seepage waters it claims to own, NMID owns nothing.¹⁸

¹⁷ The 1915 contract between NMID and BOR to excavate drainage facilities—the same document that calls Purdam Gulch Creek a “natural drainage course”—shows that the sole purpose of constructing drainage facilities was to remove water from waterlogged lands, not to collect waste or seepage waters for NMID’s reuse. The contract recited NMID’s need to remove excess water yet at the same time obtain more irrigation water. But, rather than contemplating reusing the drain water, the contract provided NMID with BOR storage water. (Aff. of M. Lawrence, Ex. C (1915 contract, pp. 1-3).) These provisions show that the original intent in excavating drain facilities was to remove (and abandon) excess water from NMID’s lands, and that NMID had no intent to reuse it.

¹⁸ NMID cites Idaho Code Section 42-110 for the proposition that “Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator.” However, this portion of Section 42-110 was not added until 2004—more than 50 years after Janicek’s predecessor’s began diverting water. Moreover, whatever rights this provision confers must be limited the constitutional requirement that water rights must be put to beneficial use.

It is undisputed that water flows in Purdam Gulch Creek year-round. (Aff. of S. King, ¶ 7; Aff of B. Janicek, ¶ 7) NMID, of course, does not provide irrigation water to its patrons year-round; its water rights are instead limited to use during the irrigation season. The fact that NMID has no water right under which it can put its waste, seepage, or return flow water to beneficial use during the non-irrigation season necessarily means that NMID cannot put such water to beneficial use. Part of Janicek's use of Purdam Gulch Creek water occurs outside the season of use for NMID's water rights. (Aff. of B. Janicek, ¶ 5.)

It is further undisputed that NMID does not put all of its waste or seepage water that collects in Purdam Gulch Creek to beneficial use during the irrigation season. Janicek has diverted and used water from Purdam Gulch Creek during the irrigation season for over 50 years and not once has NMID complained that this use has interfered with its alleged use of water from Purdam Gulch Creek. (Aff. of B. Janicek, ¶ 6.) The only logical conclusion from this is that NMID does not beneficially use all of the waste, seepage and return flow water that collects in Purdam Gulch Creek; if it had then presumably at some point it would have sought to curtail Janicek's use.

While it is not apparent (or relevant in this proceeding) whether NMID's alleged diversions from Purdam Gulch Creek to the Saint James Place subdivision or the Kennedy Lateral are a proper exercise of the incident rights of its original appropriation,¹⁹ NMID's

¹⁹ NMID arguably cannot legally divert water from Purdam Gulch Creek to irrigate St. James Place Subdivision or lands via the Kennedy Lateral because those are not the lands to which the recaptured water is appurtenant. See *Thompson v. Bingham*, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956) ("seepage water or waste water . . . 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"). The land to which irrigation water is appurtenant is the land to which it is applied. See I.C. § 42-101 ("the right to the use of any of the public waters . . . shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied"). That a water right is appurtenant to the land on which it is applied within irrigation districts is recognized in Idaho Code Section 42-915, which states that a "water right shall forever remain a part of said tract of land [irrigated by the water]." This interpretation was confirmed recently by the Idaho Supreme Court in *U.S. v. Pioneer Irr. Dist.*, 157 P.3d 600,

“paramount right” to water in Purdam Gulch Creek that can be identified as waste or seepage water exists only insofar as NMID puts it to beneficial use. “Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 154 P.3d 433, 451 (2007). “Hoarding” is precisely what NMID is trying to do in this case; NMID is attempting to establish an exclusive right to public waters without putting it to beneficial use. This is unconstitutional and unlawful and this Court should not sanction it by ruling in NMID’s favor in this matter.

In summary, because the waters in Purdam Gulch Creek are public waters, Janicek is entitled to appropriate them under state law. This is true even if the waters are NMID’s waste or seepage waters and regardless of whether Purdam Gulch Creek is a natural channel. NMID’s “paramount” right to recapture water is limited to the extent that NMID actually puts such water to beneficial use. In any case, however, Idaho law is clear that this paramount right does not preclude others from establishing water rights in the so-called waste or seepage waters.

III. NMID’S LICENSE AGREEMENT WITH BRADLEY JANICEK DOES NOT ESTOP JANICEK WITH RESPECT TO ITS WATER RIGHT IN PURDAM GULCH CREEK.

The 1996 license agreement NMID entered into with Bradley Janicek (one member of Janicek Properties, LLC) for water diversions from the Sky Pilot Drain (the “Sky Pilot License”) does not estop Janicek from asserting a water right on Purdam Gulch Creek. The question one might ask is: Why would Bradley Janicek enter into a license agreement with NMID to use

608 (2007). The *Pioneer* Court also noted that “The Reclamation Act provides that ‘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, measure, and limit of the right.’ 43 U.S.C. § 372.” *Id.* at 604 (emphasis added). The right of an individual irrigator to recapture and reuse the waste or seepage waters appurtenant to its property within an irrigation district would be abrogated if NMID is allowed to recapture and reuse waste and seepage waters elsewhere within its boundaries.

water from a different drain on different property he operates individually as a lessee? A myriad of reasons present themselves, most of which would have nothing to do with Janicek Properties, LLC's diversion from Purdam Gulch Creek, and all of which must be affected by different attendant facts. Another reasonable question might be why would Janicek enter into a license agreement with NMID to divert water from Purdam Gulch Creek when it already had a 1951 water right out of Purdam Gulch Creek? The issues are unrelated, dependent on different facts, and quite possibly different rules. The Sky Pilot License is not an admission by Janicek Properties as to any issue in this subcase. Nor is Janicek Properties, LLC somehow estopped by decisions or actions taken by one of its members on that members' own behalf in unrelated circumstances.

In any event, not until NMID's objection in this subcase, has NMID ever asserted that Janicek or its predecessors did not have a right to divert water from Purdam Gulch Creek without NMID's permission. (Aff. of B. Janicek at ¶ 6)

CONCLUSION

NMID and BOR have not provided the substantial evidence necessary to rebut the presumption created by IDWR's recommendation and therefore have not raised a genuine issue of material fact. NMID and BOR have attempted to lay claim to water they do not beneficially use, and invalidate a lawful appropriation of water from Purdam Gulch Creek. That appropriation, supported by the *prima facie* evidence of IDWR's recommendation, and by undisputed facts showing continuous diversion and beneficial use by Janicek and its predecessors, requires as a matter of law, that Janicek be decreed as a water right as

recommended by IDWR. Janicek respectfully requests this Court enter summary judgment in its favor.

DATED this 28th day of March, 2008.

Respectfully submitted,

GIVENS PURSLEY LLP

By

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer
Michael P. Lawrence

I HEREBY CERTIFY that on this 28th of March 2008, the foregoing was filed, served, or copied as follows:

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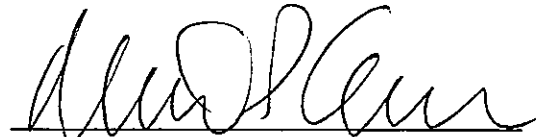
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