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DEPARTMENT OF
WATER RESOURCES

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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	)	Subcase No. 74-54
	)	
	)	
Case No. 39576	)	LEADORE LAND PARTNERS' REPLY TO
	)	WHITTAKER'S RESPONSE TO LEADORE'S
	)	MOTION FOR PARTIAL SUMMARY JUDGMENT

Leadore Land Partners Ltd. Partnership (Leadore Land) moved for partial summary judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure. F. James and Paula J. Whittaker (Whittaker) filed a Response on or about March 27, 2008. The Whittaker Response for 74-54 includes arguments related to the objections to 74-40, such as "74-54 should not be partially decreed with a point of diversion from Big Timber Creek,"¹ and 74-54 "has been historically used only from Little Timber Creek."² Leadore Land is replying to the arguments related to 74-54.

I. Evidence

"To date, Claimants have not provided any affidavits or other evidence-other than the decree evidence for this water right-disputing the non-use of 74-54. And even if such evidence is

¹ Response to Leadore Land Partners Ltd. Partnership's Motion for Partial Summary Judgment at 3.

presented, it would need to overcome the significant amount of evidence presented by Whittaker supporting his contention of non-use, including testimony from the watermaster, Dan Smith.”³

A. Claim of Leadore’s Lack of Evidence

The assertion that Leadore provides no evidence to dispute Whittaker’s assertion of non-use of 74-54 other than the decree misses the importance of the connection between the investigation conducted in preparation for the Lemhi adjudication and IDWR’s current recommendation for 74-54. The relationship between the Lemhi decree for 74-54 and the IDWR recommendation of 74-54 to the SRBA court is integral to the prima facie weight of the SRBA recommendation. The partial decree for the Lemhi adjudication (Dec. 30, 1982) was entered less than five years before the commencement of the SRBA on Nov. 19, 1987. As a result of this timing, SRBA claims arising from the Lemhi Adjudication decree were exempt from claim fees in the SRBA.⁴ Instead of the claimant preparing and filing the SRBA claim with the applicable filing fee, IDWR prepared the SRBA claim (as was done for SRBA claim 74-54) by printing the water right information as it was determined in the Lemhi Adjudication. There was no filing fee. Only if the claim was late or was different from the original decree would a filing fee be required.⁵ Thus, the determination of the “nature and extent” of water right 74-54 in the Lemhi Adjudication was the basis for the SRBA recommendation of 74-54.

² *Id.* at 3-4.

³ *Id.* at 2-3.

⁴ Idaho Code §42-1414 provides for fees for filing a notice of claim in adjudication proceedings commenced or enlarged on or after January 1, 1985. This language has been interpreted by IDWR as exempting certain claimants from paying a filing fee for notices of claims filed in the SRBA. (from memo #13)Memo #13, Beeman Affidavit in Support of Leadore Land Partners Ltd. Partnership’s Response to Whittaker’s Motion for Summary Judgment Exhibit #1.

⁵ See Memo #13, Beeman Affidavit in Support of Leadore Land Partners Ltd. Partnership’s Response to Whittaker’s Motion for Summary Judgment Exhibit #1.

The determination of the “nature and extent” of water right 74-54 in the Lemhi Adjudication was based on IDWR’s required examination of the water right.⁶ The field examination on June 9th, 1972 found that “the land **was being irrigated** but was **sagebrush covered**.”⁷ Whittaker’s Motion for Summary Judgment does not dispute these circumstances, but it does demonstrate why IDWR’s examination and recommendation are accorded prima facie weight. IDWR is required to go on the land [which it did] and then based on its examination it makes a recommendation. There was no “MISTAKE”; IDWR did an exam and then recommended 74-54. That IDWR observed the same conditions that the Whittaker Motion describes does not negate IDWR’s recommendation of 74-54 in Lemhi Adjudication or now in the SRBA. IDWR used its expertise to investigate and recommend 74-54.

B. Whittaker Factual Assertions do not meet the summary judgment standard, nor do they overcome the prima facie standard of the Director’s recommendation for 74-54

The assertion that Leadore’s evidence needs to overcome the “significant” amount of evidence presented by Whittaker misses the importance of the prima facie standard that is applied to the director’s report. As explained in Leadore’s *Response*, Idaho Code section 42-1411(5) shifts that burden to the objector.

Furthermore, while a “significant” amount of material has been presented by Whittaker in or with affidavits that accompanied the Whittaker Motion, the information as to 74-54 does not establish undisputed facts for summary judgment. First, if Whittaker were able to overcome the

⁶ IDWR’s field examination notes and map are Exhibit 2 to the Affidavit in Support of Leadore Land Partners Ltd. Partnership’s Response to Whittaker’s Motion for Summary Judgment

⁷ Beeman Affidavit, Exhibit 2 (Field Exam Notes from the IDWR Lemhi Adjudication file for water right 74-54).

presumption of correctness afforded to the director's report, Whittaker, in order to establish forfeiture, would need "clear and convincing" evidence that water was available for use under 74-54, before it can be determined that water right 74-54 was forfeited by nonuse of the water. It has to be determined that water was available to 74-54 under its priority and that the available water was not diverted. The absence of delivery by the water master does not establish that water was available under 74-54's priority. Also, water master delivery records are not evidence of water use that occurred during the season of use before the water master was called on. The facts attested to by the other affiants are consistent with IDWR's field exam of 75-54 during the Lemhi Adjudication.

Finally, even if there were evidence to establish a consecutive five year period of non-use during the relevant period of December 30, 1982 to April 9, 1990, Whittaker would also need to present evidence to defeat the defense of resumption of use. As was discussed in Leadore Land's Response (p. 7), this would require "clear and convincing" evidence that a junior appropriator *actually* used water that was available *only* because of continued non-use of 74-54.⁸ Such evidence is not before the court.

III. Res Judicata

"...in the event summary judgment is not successful based on the theories advanced above, a challenge to the Lemhi Adjudication and/or claim of mistake in the Lemhi Adjudication would

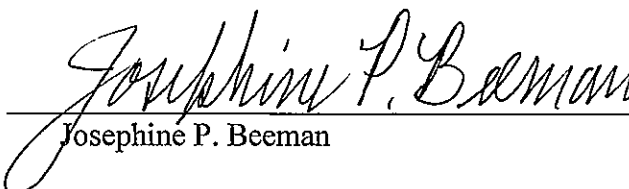
⁸ See *Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P.3d 69 (2003).

be raised at trial.”⁹ IRCP Rule 60(b), which provides for relief of a party from a final order, judgment, or proceeding based on a claim of mistake, requires that “[t]he motion shall be made within a reasonable time...not more than six (6) months after the judgment, order, or proceeding was entered or taken.”

The equitable argument raised by Whittaker is unavailable to Whittaker or other objectors to 74-54. “There is nothing to preclude a court from considering this evidence upon an equitable theory raised by Whittaker...”¹⁰ The objectors, including Whittaker, were party or privy to the Lemhi Adjudication. As such, despite the notice and due process procedures available when 74-54 was recommended in the Lemhi Adjudication, neither Whittaker nor any of the other objectors, came forward to object to 74-54. The information they produce now is consistent with IDWR’s investigation of 74-54. IDWR did not make a mistake. It investigated and recommended 74-54. The objectors cannot look behind the Lemhi Adjudication when they did not exercise the due process rights afforded them during the Lemhi Adjudication.

Dated this 3rd day of April 2008.

BEEMAN & ASSOCIATES, P.C.
Attorneys for Leadore Land Partners Ltd. Partnership

By 
Josephine P. Beeman

⁹ Response to Leadore Land Partners Ltd. Partnership’s Motion for Partial Summary Judgment at 4.

¹⁰ *Ibid.*

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 2008, I caused a true and correct copy of the foregoing **LEADORE LAND PARTNERS' REPLY TO WHITTAKER'S RESPONSE TO LEADORE'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be deposited in an official U.S. Post Office receptacle with proper First Class postage affixed, addressed to the following:

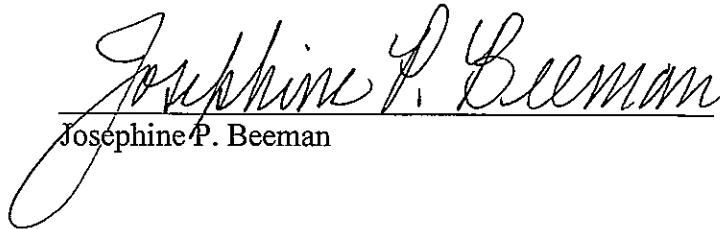
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