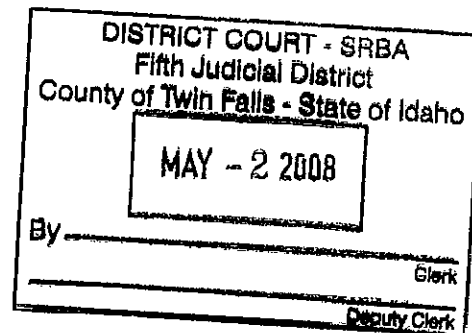


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DEPARTMENT OF
WATER RESOURCES



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

)

SUBCASE 27-00016C

)

Case No. 39576

)

ORDER DENYING SUMMARY JUDGMENT
(Walker)

)

I. PROCEDURAL BACKGROUND

Water right 27-16C was claimed in the SRBA on May 2, 1989, by Marion Walker. This right was recommended with a state basis in the *Director's Report*. An *Objection* was filed by the Shoshone-Bannock Tribes (hereafter the "Tribes") asserting that part of the place of use is located on the Fort Hall Reservation. The Tribes assert that a private individual may not have a water right on Tribal land.

The Tribes filed a *Motion for Summary Judgment of Dismissal* on January 11, 2007. The *Motion* asked the court to eliminate land on the Reservation from the place of use. In support of the *Motion*, the Tribes filed a *Memorandum of Law in Support of Shoshone-Bannock Tribes' Motion for Summary Judgment* (hereafter "*Tribes' Brief*") and the *Affidavit of Frederick A. Hernandez in Support of Shoshone-Bannock Tribes Motion for Summary Judgment* (hereafter "*Hernandez Affidavit*"). A hearing on the motion was held March 12, 2008.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . ." to determine whether the moving party is entitled to summary judgment.

I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are functions to be performed at trial. *Nelson v. Steer*, 118 Idaho 409, 707 P.2d 117 (1990), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Idaho Supreme Court has said that if the pleadings, depositions, admissions, or affidavits on file indicate that there is no genuine issue of material fact, then the moving party may be entitled to summary judgment.

Summary judgment is properly issued if the pleadings, depositions, and admissions on file, together with affidavits, indicate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). Summary judgment is properly issued when the non-moving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case.

Badell v. Beeks, 756 P.2d 126 (1988).

The courts have consistently required a nonmovant's showing to go beyond merely raising qualms about the facts: "Creating only a slight doubt as to the facts will not defeat a summary judgment motion. . . ." *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 549, 691 P.2d 787, 791 (Ct. App. 1984). Clearly summary judgments are to be decided upon actual factual disputes present in the record and not upon what might have been shown or what the nonmovant supposes will be shown.

III. FACTS

The Tribes objected to irrigation claims in Basin 27. The *Objections* are based on the 1990 *Fort Hall Indian Water Rights Agreement* (hereafter "*Fort Hall Agreement*") and the subsequent *Partial Final Consent Decree Determining the Right of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (91-00022) (Aug. 2, 1995)

(hereafter “*1995 Consent Decree*”). The Tribes explained that their *Objections* are based on a provision in the *1995 Consent Decree* which decreed water rights within the exterior boundaries of the Fort Hall Reservation. During the hearing held on February 26, 2008, the Tribes explained that the *Objection* to this water right is based on the boundary of the Fort Hall Reservation and the impact of a 1964 realignment of the Blackfoot River.

The following facts were not disputed:

1. On June 14, 1867, President Andrew Jackson issued Presidential Executive Order designating a Reservation for the Boise and Bruneau Bands of Shoshone.
2. On July 3, 1868, the Second Treaty of Fort Bridger was concluded, which provided for the creation of a Reservation for the Tribes.
3. In 1869, President Ulysses S. Grant signed the Executive Order of 1869 which established the Fort Hall Reservation based on the Second Treaty of Fort Bridger.
4. The Blackfoot River is part of the boundary of the Fort Hall Reservation.
5. In 1964, the U.S. Army Corps of Engineers completed a flood protection project on the Blackfoot River which realigned the channel of the Blackfoot River.

IV. ANALYSIS

A. The Tribes’ Argument

The Blackfoot River established part of the boundary of the Fort Hall Reservation. The Tribes explained that the U.S. Army Corps of Engineers conducted a flood protection project on the Blackfoot River in 1964. The project apparently realigned the Blackfoot River. The Tribes argued that the realignment of the Blackfoot River has or will result in a concurrent adjustment of the Fort Hall Reservation boundary. The Tribes asserted that when the river channel changed, some land previously owned by Walker became Reservation land because it is on the Reservation side of the river. The Tribes argued that Walker should not have a water right located on Reservation land. In support of their argument, the Tribes submitted the *Hernandez Affidavit*.

B. The *Hernandez Affidavit*

The *Hernandez Affidavit* establishes that Mr. Hernandez has knowledge of the current boundaries of the Fort Hall Reservation. *Hernandez Affidavit* at 1, ¶ 2. Mr. Hernandez said the United States Bureau of Land Management has resurveyed the northern boundary of the Fort

Hall Reservation. Mr. Hernandez has “reviewed the re-surveys and determined that certain lands owned by the Tribes and individual members of the Tribes are located on the northern side of the present Blackfoot River channel and certain lands owned by non-Indian water users are located on the southern side of the present Blackfoot River channel.” *Hernandez Affidavit* at 2, ¶ 3.

Finally, Mr. Hernandez stated that he “personally conducted a site visit of the re-surveyed area and observed cultivation and other use on Reservation lands by the claimant [Mr. Walker], who has claimed a water right in the Snake River Basin Adjudication for said lands. Based on the boundary re-surveys the claimant’s place of use is partially on Tribally or individually owned Indian lands.” *Id.* at 2, ¶4. The *Hernandez Affidavit* does not describe the location of that portion of Walker’s place of use alleged to be located on the Reservation. The *Hernandez Affidavit* does not quantify the number of acres asserted to be located on Reservation land.

C. Marion Walker’s Argument

At the hearing, Marion Walker argued that the realignment of the Blackfoot River in 1964 created a legitimate dispute over ownership of land on both sides of the Blackfoot River in the area of the realignment. Walker described the land dispute as one which involves some forty-two (42) non-Indian landowners who are affected by the realignment. Walker and other non-Indian land owners argue that the Reservation boundary is still legally located along the historic river channel as it existed prior to the realignment. Walker argued that without Congressional authorization, realignment does not change the Reservation boundary.

In addition, Walker argued that the facts alleged in the *Hernandez Affidavit* create genuine issues of material fact as to the Reservation boundary and do not justify a finding for the Tribes. For example, the *Hernandez Affidavit* states that Hernandez personally conducted a site visit and “observed cultivation and other use on Reservation lands by the Claimant.” However, the affidavit does not describe where this land is, nor does the affidavit enumerate how many acres are at issue. Thus, the location of and number of acres stated to be on the Reservation and the correct place of use for this water right are not resolved by the *Hernandez Affidavit*. Walker argued that the *Hernandez Affidavit* creates genuine issues of material fact as to the place of use.

Finally, Walker reported that the Tribes and the non-Indian landowners are working towards federal legislation to adjust the Reservation boundary to align with the existing river. The time frame for possible Congressional actions, however, is unknown.

V. CONCLUSION

The court must look to the pleadings, depositions, and admissions, together with any affidavits, to determine whether the Tribes, as the moving party, are entitled to summary judgment. This *Motion* must be analyzed by looking at the moving party's duties under Rule 56. The moving party must show the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). Here, the Tribes must show there are no genuine issues of material fact regarding the location of Walker's land. In order to prevail on summary judgment, the Tribes would need to show where the land is located so the court could determine whether that was on or off the Reservation. Additionally, the Tribes would need to show the acres located on the Reservation. The *Director's Report* lists the place of use, but does not refer to the Reservation. The *Objection* does not set forth any information regarding the location of Walker's land.

The *Hernandez Affidavit* states that Mr. Hernandez has "personal knowledge of information pertaining to the various cession agreements between the United States and the Shoshone-Bannock Tribes, and the current boundaries of the Ft. Hall reservation in southeastern Idaho." *Hernandez Affidavit* at 1 ¶ 2. However, the affidavit does not explain whether Mr. Hernandez is referring to the Reservation boundary as defined by the historic channel of the Blackfoot River or the post-1964 realigned Blackfoot River.

The *Hernandez Affidavit* states that Mr. Hernandez has "reviewed the re-surveys [of the northern boundary of the Reservation] and determined that certain lands owned by Shoshone-Bannock Tribes and individual members of the Tribes are located on the northern side of the present Blackfoot River channel, and certain lands owned by non-Indian water users are located on the southern side of the present Blackfoot River channel." *Hernandez Affidavit* at 2, ¶ 3. This portion of the affidavit does not refer to Walker or to his water right. However, the affidavit goes on to say that Mr. Hernandez has observed cultivation by Mr. Walker on the Reservation.

I have personally conducted a site visit of the re-surveyed area and observed cultivation and other use on Reservation lands by the claimant, who has claimed a water right in the Snake River Basin Adjudication for said lands. Based on the boundary re-surveys, the claimant's place of use is partially on tribally or individually owned Indian lands.

Id. at 2, ¶ 4.

Thus, the *Hernandez Affidavit* concludes that some of Walker's place of use is located on the Reservation. However, it is unclear whether this statement is based on the realigned river boundary or the historic river boundary. The Tribes took the position at oral argument that the Reservation boundary can only change by Congressional Act, not by a mere physical realignment of the river by the U.S. Army Corps of Engineers. However, even if the realignment of the Blackfoot River automatically realigned the Fort Hall Reservation, the *Hernandez Affidavit* does not supply sufficient evidence to rule on the place of use on a summary judgment standard. The *Hernandez Affidavit* does not identify the legal description for the Walker land allegedly on the Reservation. The *Hernandez Affidavit* does not describe the number of acres in the Walker place of use allegedly located on the Reservation.

The court notes that some circumstances may allow a non-landowner to hold water rights on land he does not own. Idaho courts recognize that the ownership of a water right can be separate from the ownership of the land on which the right is used. *L U Ranching Co. v. U.S.*, 144 Idaho 89, 156 P.3d 590 (2007); *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 156 P.3d 502 (2007). In this case, the Tribes object to a third-party having any type of interest in using Reservation lands. The parties do not dispute that issues exists over the correct boundaries of the Reservation based on the alteration of the Blackfoot River streambed. The parties also acknowledge that the U.S. Congress is presently addressing the issue, and one potential solution is reconfiguring the Reservation boundaries consistent with the altered streambed. There are no guarantees with respect to the outcome of the Congressional action or on the time it will take to complete.

Based on the foregoing circumstances, it would seem that the water rights would, nonetheless, be decreed in the manner that: 1) preserves the water rights of the existing user, except as to undefined portions of the place of use; 2) protects the Tribes from having a third-party establishing an interest or right to use Reservation lands; 3) allows for the boundary dispute to be resolved in an appropriate forum, not the SRBA; and 4) acknowledges that based on the outcome of the boundary dispute or subsequent legal action to eject water users from Reservation lands, the place of use for the water right will have to be transferred to non-Reservation land.

This may be accomplished through the use of a remark included in each of the decrees providing substantially as follows:

As a result of the artificial alteration of the natural stream channel of the Blackfoot River which historically defined the boundaries of the Shoshone-Bannock Reservation, portions of the above-described place of use may include Reservation lands. The boundaries of the Reservation are currently being addressed by the U.S. Congress. The decreed place of use for those portions of the place of use which may be located on Reservation lands does not create or inure to the water right owner any property interest or right to use the underlying lands. Those portions of the water right determined to be located on Reservation lands or upon legal action for ejectment from said lands will have to be transferred to non-Reservation lands.

In summary, the court has reviewed the *Objection*, the *Director's Report*, the *Response* and the *Hernandez Affidavit* filed in this subcase. The *Objection* sets forth the Tribes' legal position that some of Walker's land is on the Reservation, but does not set forth facts. The *Director's Report* sets forth a legal description for the place of use, but does not refer to the Reservation. Thus, neither the *Objection* nor the *Director's Report* resolves the place of use issue under the summary judgment standard. Finally, the *Hernandez Affidavit* does not resolve the place of use either. The affidavit is ambiguous as to the location of Walker's place of use. Genuine issues of material fact remain for trial as to the place of use. Therefore, the Tribes' *Motion for Summary Judgment* is **denied**.

Dated May 2, 2008.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING SUMMARY JUDGMENT was mailed on May 02, 2008, with sufficient first-class postage to the following:

MARION P WALKER

Represented by:
BUDGE, THOMAS J
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

SHOSHONE-BANNOCK TRIBES

Represented by:
JEANETTE WOLFLEY
SPECIAL COUNSEL
SHOSHONE-BANNOCK TRIBE
202 N ARTHUR
POCATELLO, ID 83202
Phone: 208-232-1922

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098