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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY - 2 2008	
By _____	Clerk
Beauty Clark	

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 27-04020
	)	
Case No. 39576	)	ORDER ON SUMMARY JUDGMENT
_____	)	(Conlin)

I. PROCEDURAL BACKGROUND

Water claim 27-04020 was claimed in the SRBA by William Bart Conlin, Inc. (hereafter "Conlin"). The right was recommended in the *Director's Report* with a domestic and stockwater purposes of use. The original *Director's Report* did not recommend the irrigation purpose claimed.

Conlin filed an *Objection* asking that the irrigation purpose be included. An *Amended Director's Report* was filed by the Idaho Department of Water Resources (IDWR) which added the irrigation purpose. Neither the original *Director's Report* nor the *Amended Director's Report* included a volume limitation on the irrigation purpose. The Shoshone-Bannock Tribes (hereafter "Tribes") filed an *Objection* seeking a volume limitation.

A *Motion for Summary Judgment* was filed by Conlin on January 14, 2008. The *Motion* asked the court to grant summary judgment in favor of Conlin as to the Tribes' volumetric objection. The *Motion* was based on the *Affidavit of Wm. Bart Conlin in Support of Motion for Summary Judgment*. The *Affidavit* asserts that water right 27-04020 has Gardiner Spring as its source. The *Affidavit* states that "the water . . . never reaches or enters the Blackfoot River, it never leaves the property nor does it ever enter into any other stream, creek, or body of water." *Affidavit* at 2, ¶ 8.

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).

In addition, the moving party is entitled to judgment if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case. Summary judgments are to be decided upon actual factual disputes present in the record.

Idaho courts have consistently held that unsworn statements are entitled to no probative weight in passing on summary judgment. *Camp v. Jimminez*, 107 Idaho 882.

III. FACTS

The Shoshone-Bannock Tribes filed *Objections* to many irrigation claims in Basin 27, including this one. The Tribal *Objections* are based on the 1990 Fort Hall Indian Water Rights Agreement (hereafter “1990 Fort Hall Agreement”) and the subsequent *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, 92-00022 (Aug. 2, 1995). The Tribes explained that their *Objections* are based on a provision in the 1990 Fort Hall Agreement which establishes an equitable apportionment of water for the Tribes if the non-tribal withdrawals from the basin exceed 45,000 acre feet per year from the Blackfoot River. During the hearing held on February 26, 2008, the Tribes explained that the volumetric *Objections* were based on the 1990 Fort Hall Agreement and, therefore, withdrawals from the Blackfoot River drainage.

The following facts were not in dispute on summary judgment:

1. The Shoshone-Bannock Tribes filed *Objections* to the *Directors Report* for irrigation claims in Basin 27, including this right, 27-04020, which did not contain an annual volume of diversion limit. *Shoshone-Bannock Tribes’ Opposition to Bart Conlin’s Motion for Summary Judgment* at 2.
2. The Shoshone-Bannock Tribes’ *Objections* are based on a settlement agreement entered into by the Tribes entitled *1990 Fort Hall Indian Water Rights Agreement*. *Id.*
3. The Shoshone-Bannock Tribes contend that the *1990 Fort Hall Indian Water Rights Agreement* established an annual collective diversion volume for water rights tributary to the Blackfoot River. *Id.*
4. Water right 27-04020 is claimed by William Bart Conlin, Inc.
5. The source for water right 27-04020 is Gardiner Spring.
6. The *Director’s Report* describes the source element for water right 27-04020 as “Gardiner Spring Tributary: Sinks.”

IV. ANALYSIS

A. Conlin’s Argument

Conlin’s *Motion for Summary Judgment* asks that the Tribes’ *Objection* to the lack of a volume limitation be dismissed under the summary judgment standard because no genuine

issues of material fact remain to be determined. The Tribes' volumetric *Objections* depend on each claim being tributary to the Blackfoot River. Conlin asserted that this claim is not tributary to the Blackfoot River. Conlin argued that "[t]his water [right] and its use does not impact the Shoshone-Bannock Indians or the Blackfoot River. . . ." *Motion for Summary Judgment* at 1-2.

In support of the *Motion*, the movant filed the *Affidavit of Wm. Bart Conlin in Support of Motion for Summary Judgment* (hereafter "*Affidavit*"). The *Affidavit* asserts that Mr. Conlin and his father installed a pipeline from Gardiner Spring in 1955. *Affidavit* at 1, ¶ 4. The pipeline is approximately ½ mile long and delivers water to irrigate 10 acres of farmland. *Affidavit* at 2, ¶ 5.

The *Affidavit* asserts that water right 27-04020 is not connected to the Blackfoot River. "[T]he water not only never reaches or enters the Blackfoot River, it never leaves the property nor does it ever enter into any other stream, creek, or body of water." *Affidavit* at 2, ¶ 8.

B. The Tribes' Argument

The Shoshone-Bannock Tribal *Objections* are derived from provisions contained in the *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, 92-00022 (Aug. 2, 1995) (hereinafter "*1995 Consent Decree*"). The *1995 Consent Decree* includes a "subordination provision." The "subordination provision" provides that the Tribes and the United States subordinate the exercise of the Tribes' Blackfoot River natural flow water right (water right 27-11375) to certain non-Indian water rights in the Blackfoot River. *Shoshone-Bannock Tribes' Opposition to Bart Conlin's Motion for Summary Judgment* at 1. The Tribes point out that the "subordination provision" was based on estimates that the total annual diversion volume of the non-Indian water rights would not exceed 45,000 acre feet per year. The Tribes concurred that their *Objections* are based on the *1995 Consent Decree* and thus pertain only to water rights tributary to the Blackfoot River.

The Tribes argued that water right 27-04020 is tributary to the Blackfoot River. Specifically, the Tribes asserted that "Mr. Conlin's water source, Gardiner Spring, is tributary to the Blackfoot River, and depletions from tributary streams have the same impact on the Tribes'

water rights as depletions caused by diversions from the main stem Blackfoot River.” *Tribes’ Brief* at 2.

The Tribes argued that “[g]roundwater flows can be considered as ‘tributaries’ to the Blackfoot River, just as surface water creeks are considered tributaries.” *Id.* at 2-3. The Tribes argued that “the flows of the Blackfoot River represent a combination of tributary flows, both from surface and ground water sources. As one moves higher in the basin, there is no main stem Blackfoot River but rather numerous tributaries which intersect to form the river.” *Id.* at 3. The Tribes concluded, therefore, that “any depletion that occurs along those tributaries has the same effect as diverting and depleting from the main stem Blackfoot River because the river is basically the combination of these various tributary building blocks.”

The Tribes asserted that this subcase should not be dismissed on summary judgment because the court should decide whether Gardiner Spring is tributary to the Blackfoot River. However, the Tribes acknowledged that they had produced no affidavits. The court allowed additional time to file affidavits, but a timely affidavit was not filed. The *Director’s Report* did not contain any information as to whether Gardiner Spring is tributary to the Blackfoot River.

V. CONCLUSION

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). Both the Tribes and Conlin recognize that water rights not tributary to the Blackfoot River are unrelated to the Tribal *Objections*. The issue on summary judgment was whether genuine issues of material fact remain as to Gardiner Spring’s connection to the Blackfoot River. Conlin set forth facts in the *Affidavit* stating that the source of water, Gardiner Spring, is not tributary to the Blackfoot River. The *Director’s Report* does not provide evidence as to whether this water right is tributary to the Blackfoot River.

Once the moving party presents evidence on a genuine issue, the nonmoving party on summary judgment must affirmatively present evidence which shows a genuine issue of material fact. The very mission of summary judgment is to pierce the pleadings and assess the proof to determine whether there is a genuine need for a trial.

The Tribes' brief contained a cogent argument about how this water right may be tributary to the Blackfoot River. What is missing is a timely factual allegation to connect facts to the argument and create a genuine issue of material fact. Legal argument on summary judgment does not replace the need for factual allegations.

In order to defeat a motion for summary judgment which is supported by an admissible, relevant affidavit, there must be facts of record which create a genuine issue of material fact. Conlin's *Affidavit* alleged that this water right is not tributary to the Blackfoot River. The Tribes contributed a sound legal argument, but no supporting affidavits.

The court reviewed other documents, including the *Objection*, the *Director's Report*, and the *Responses* filed in this subcase. The *Objection* sets forth the Tribes' position that water rights in Basin 27 should have volumetric limitations if they are part of the Blackfoot River system. It does not contain any factual allegations about whether this water right is tributary to the Blackfoot River. The *Director's Report* lists the source as Gardiner Spring and states Tributary: Sinks. There is no indication about whether the source for this water right is connected to the Blackfoot River. The *Response* by Conlin asserts that this right is not connected to the Blackfoot River. The *Response* by the State of Idaho merely indicates that the State is responding to the quantity issue and does not contain any allegations relating to the connection between Gardiner Spring and the Blackfoot River.

The court has considered those documents, but has found that they do not contain allegations relating to the connection between the Blackfoot River and Gardiner Spring. The argument contained in the Tribes' brief does not provide the probative evidence necessary to raise a genuine issue of material fact. Therefore, for purposes of summary judgment, the court is left with the un rebutted *Affidavit of Wm. Bart Conlin in Support of Motion for Summary Judgment*. That affidavit asserts that Gardiner Spring is not connected to the Blackfoot River.

Therefore, the court finds that Conlin prevails on summary judgment as to the volume issue. Because the *Affidavit* was un rebutted by a timely affidavit or other evidence, Conlin's *Motion for Summary Judgment* as to the volume limitation is **granted**.

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 ON SUMMARY JUDGMENT was mailed on May 02, 2008, with sufficient first-class postage to the following:

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