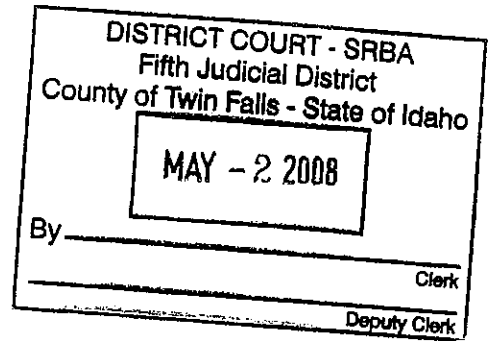


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DEPARTMENT OF
WATER RESOURCES



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 27-07320
	)	
Case No. 39576	)	ORDER DENYING SUMMARY JUDGMENT
	)	(Clawson)

I. PROCEDURAL BACKGROUND

Water right 27-7320 was claimed in the SRBA by Connie, Michael, Beth and Moroni Clawson.¹ This right was recommended in the *Director's Report* based on a license. An *Objection* was filed by the Shoshone-Bannock Tribes (hereafter "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 *Shoshone-Bannock Tribes' 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 the *Shoshone-Bannock Tribes' Memorandum in Support of 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

¹ Based on the *Notice of Completed Administrative Proceeding* filed March 17, 2008, the current claimants are Michael and Connie Clawson.

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 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) (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 re-surveying the original reservation boundary.

The following facts were not disputed:

1. On June 14, 1867, President Andrew Jackson issued a 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 realigning the channel of the Blackfoot River.
6. Part of the original Reservation boundary has been re-surveyed.

IV. ANALYSIS

A. The Tribes’ Argument

The Tribes argue that this subcase raises an issue relating to the boundary of the Fort Hall Reservation. This subcase, however, is distinct from the boundary issue raised 27-00016C. This subcase does not relate to the realignment of Blackfoot River, which occurred in 1964. Instead, the issue in this subcase is whether a recent re-survey of the original Reservation boundary shows some of the Clawsons’ place of use to be on the Reservation. The Tribes contend that recent re-surveys show land that was previously thought to be privately owned is now identified as on the Reservation. The area re-surveyed is near the Clawsons’ place of use. The Tribes assert “[t]he Clawsons filed their water right claim seeking a water right which includes lands located on the Fort Hall Reservation.” *Tribes’ Brief* at 1.

The Tribes further assert that “[t]he Department of Interior, Bureau of Land Management, Cadastral Survey Office, conducted surveys of the Blackfoot River in 1999 through 2003, and has prepared plats representing the surveys that show the present course of the Blackfoot River and identify the Fort Hall Reservation borders that existed at the time the Reservation was established.” *Id.* at 2, ¶ 6. The court understood Tribal counsel to say that this *Objection* does not relate to the 1964 realignment of the Blackfoot River, but instead relates solely to re-surveying of the original Reservation boundaries. Thus, the argument is that the Reservation boundaries have not changed, but recent surveys more accurately describe those boundaries. The Tribes allege that some land in the Clawsons’ place of use is located on the Reservation.

B. The *Hernandez Affidavit*

In support of the *Motion for Summary Judgment*, the Tribes submitted the *Hernandez Affidavit*. The *Hernandez Affidavit* established that Mr. Hernandez has knowledge of the current boundaries of the Fort Hall Reservation. *Hernandez Affidavit* at 1, ¶ 2. In addition, Mr. Hernandez stated he has “personal knowledge of the original boundary surveys performed by the United States along portions of the northern boundary of the Fort Hall Reservation.” *Id.* at 2, ¶ 2.

In addition, Mr. Hernandez has “reviewed the original surveys and the State of Idaho Department of Water Resources Eastern Region’s GIS Place of Use Illustration and it appears that certain lands owned by the Tribes and/or individual members of the Tribes are shown as a place of use by the non-Indian water claimant.” *Id.*, ¶ 4.

Finally, the *Hernandez Affidavit* stated that Mr. Hernandez has “knowledge that funding has been appropriated for the United States Department of Interior, Bureau of Land Management, to continue to re-survey the northern portion of the Reservation to identify possible trespass issues on Reservation lands.” The *Hernandez Affidavit* does not state that the place of use for this water right is located on the Reservation and does not describe the location of land asserted to be on the Reservation. The *Hernandez Affidavit* does not state how many acres in the place of use are located on the Reservation.

C. The Clawsons’ Argument

Mr. Clawson appeared *pro se*. Mr. Clawson essentially argued that the *Hernandez Affidavit* is insufficient for the court to rule on the place of use under the summary judgment standard. The *Hernandez Affidavit* does not eliminate any “genuine issues of material fact”

remaining for trial. Mr. Clawson contends that issues remain for trial since the location of land alleged to be on the Reservation should be described and the number of acres alleged to be on the Reservation should be enumerated.

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 as to whether some of Clawsons' land is located on the Reservation. In order to prevail on summary judgment, the Tribes would need to show where the land was 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 a place of use and enumerates the number of acres as 156.1 acres. The Tribes' *Objection* contends that some of Claimants' land may be on the Reservation, but does not describe where the land in question is located or list the number of acres at issue.

The boundaries of the Fort Hall Reservation were established by the Second Treaty of Fort Bridger in 1868 and the Executive Order of 1869. The Reservation has been surveyed to determine the Reservation boundaries. The Tribes contend that one of the re-surveys shows that some of the Clawsons' place of use is located on the Reservation. However, the *Hernandez Affidavit* does not eliminate genuine issues of material fact.

The *Hernandez Affidavit* states that Mr. Hernandez has personal knowledge of the original boundary surveys. The *Hernandez Affidavit* states that "it appears that certain lands owned by the Shoshone-Bannock Tribes and/or individual members of the Tribes are shown as a place of use by the non-Indian water claimants." The *Hernandez Affidavit* does not identify the location of the Clawsons' land alleged to be on the Reservation; nor does the affidavit enumerate the acreage alleged to be on the Reservation.

The court notes that some circumstances may allow a non-landowner to hold water rights on land he does not own. It has long been recognized in Idaho 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 exist over the correct boundaries of the Reservation based on the re-survey of the Blackfoot River.

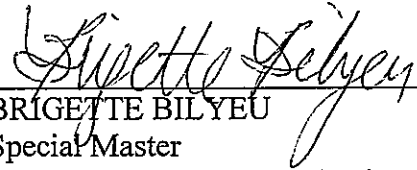
Based on the foregoing circumstances, it would seem that the water rights would, nonetheless, be decreed in the manner that: 1) preserves the water rights of the existing user, except as to undefined portions of the place of use; 2) protects the Tribes from having a third-party establishing an interest 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 re-survey of the Blackfoot River, portions of the above-described place of use may include Reservation lands. The boundaries of the Reservation are currently being addressed. 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, it is unclear where the land alleged to be on the Reservation is located. It is also unclear how many acres are alleged to be on the Reservation. There is insufficient evidence for the court to rule on the Clawsons' place of use under the summary judgment standard. Genuine issues of material fact remain for trial since there is no showing of the location of lands alleged to be on the Reservation or the number of acres at issue. Consequently, 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:

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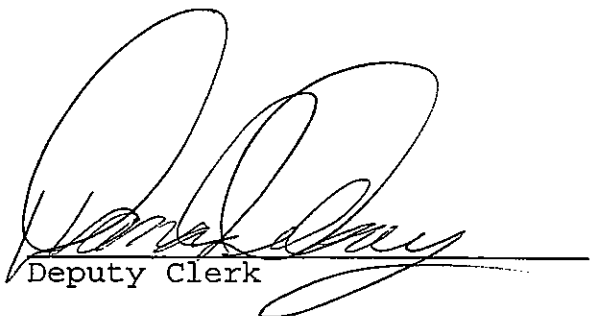
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A large, stylized handwritten signature in black ink, likely belonging to the Deputy Clerk, is written over the signature line.