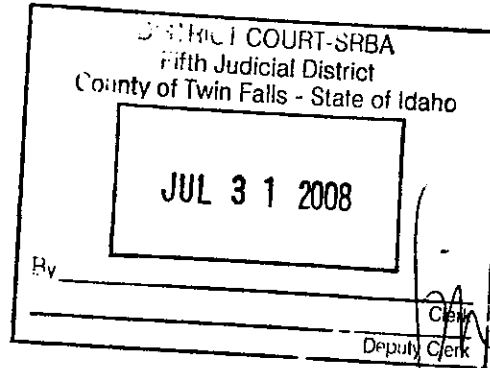


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Attorneys for Sarah Jane Smith

**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.: 63-7539

Case No. 39576

**SARAH JANE SMITH'S MOTION FOR
 SUMMARY JUDGMENT**

Claimant Sarah Jane Smith, through her undersigned counsel, moves this Court for an order pursuant to Idaho Rule of Civil Procedure 56 granting her summary judgment against Objector Craig Whitted and dismissing Mr. Whitted's objection. This Motion is made on the grounds and for the reason that there is no genuine issue of material fact concerning Ms. Smith's ownership of the disputed well and water right, and based upon the undisputed facts, Ms. Smith is entitled to judgment as a matter of law.

This Motion is based on the record and files herein, a Memorandum in Support, the Affidavit of Sarah Jane Smith, the Affidavit of David W. Vastine, M.D., and the Affidavit of J. Will Varin submitted herewith.

ORAL ARGUMENT IS REQUESTED.

FAX

TO: '12087362121@venali.net'

FROM: Tami Kruger

FAX: 12087362121

DATE: Thu, 31 Jul 2008 15:12:30 -0600

RE: FAX FILING - Memo in Support of Motion for Summary Judgment

MESSAGE

TO: SRBA, Clerk of Court (12087362121@venali.net<mailto:12087362121@venali.net>)

FROM: John Marshall, Esq./J. Will Varin, Esq.

RE: SRBA CASE NO. 39756

Attached for fax filing, please find: Sarah Jane Smith's Memorandum in Support of Motion for Summary Judgment in the above referenced matter.

Thank you,

Tami L. Kruger
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If this fax does not transmit fully or is difficult to read, please contact me at (208) 388-1200.

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STATEMENT OF UNDISPUTED FACTS

The Well is located in the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 14, Township 1S, Range 2W, Boise Meridian,¹ approximately 6 feet to the east of the line dividing the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ from the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$. The Well is one of two points of diversion for water right 63-7539, a groundwater right that authorizes 0.40 cfs for stockwater use on Sarah Jane Smith's parcel located in a part of the SW $\frac{1}{4}$ of Section 14 and the NW $\frac{1}{4}$ of Section 23 (the "SJ Smith Parcel"). The SJ Smith Parcel and the Well are depicted on Exhibit L to the Smith Affidavit. Craig and Sheila Whitted own the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 14 (the "Whitted Parcel").

The Well was constructed in December 1967. This is confirmed by the Report of the Well Driller and the Proof of Beneficial Use submitted as Exhibits E and F to the Smith Affidavit. The parties stipulated during the pretrial conference that their predecessors in interest disagreed at the time of construction regarding the location of the Well. Earl and Doris Cusic, the Whitted's predecessors in interest, believed the Well was on the Whitted Property. This fact is established by the affidavit of their daughter Carrie Cusic, provided by Mr. Whitted in response to discovery requests (Exhibit A to the Varin Affidavit). Ms. Cusic also confirms that despite their belief that the Well was on their property, the Cusics did not take any action to stop the use of it.

Rex Jensen, the original appropriator of water right 63-7539, believed the Well was located on his property in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 14. This is evidenced by his Application for Permit (Exhibit I to the Smith Affidavit), which identifies the location of the Well as being in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 14. In its licensing field exam report (Exhibit

¹ All of the property at issue in this subcase is located in either Section 14 or Section 23 of Township 1S, Range 2W, Boise Meridian. For the sake of brevity, we will drop the township, range and, where appropriate, the section identification on subsequent legal descriptions.

H to the Smith Affidavit), IDWR also determined the Well was located in the SE ¼ of the SW ¼, and the subsequently issued license identifying this quarter-quarter as the Well's location.

The geography of the Whitted Parcel likely contributed to the historic confusion about the location of the Well. The majority of the Whitted Parcel is a relatively level, irrigated parcel that sits atop a rim that drops off steeply near the west boundary of the Whitted Parcel. Smith Affidavit at ¶ 7. The Well is located below the rim in area where the prior owners apparently did not have good bearings on whether their property line was. *Id.*

Despite the historical confusion about the precise location of the Well, there is no dispute the Well has been used continuously as the point of diversion for stockwater used on the SJ Smith Parcel since December 1967. Indeed, the parties stipulated to this fact at the pretrial conference. The only disputed issue in this case is the legal effect of the relatively recent agreement by all that the Well is actually on the Whitted Parcel. As discussed below, as a matter of law the location of the Well is immaterial, and Sarah Jane Smith owns and controls the Well regardless of its precise location.

STANDARD OF REVIEW

The standard for granting summary judgment is well-settled. "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" IRCP 56(c); *Gibson v. Ada County*, 142 Idaho 746, 752, 133 P.3d 1211, 1217 (2006). This is such a case.

ARGUMENT

I. Sarah Jane Smith and her predecessors established ownership and the right to use the Well by prescription.

A. Continuous and adverse use of the Well for forty years gives rise to a prescriptive right.

The precise location of the Well is immaterial to the outcome of this case. Even though the Well is located within the Whitted Parcel, Sarah Jane Smith has established a prescriptive right to ownership and maintenance of the Well along with the right to maintain it and convey water from it via a pipeline.

Idaho law has long recognized the existence of ownership by prescription. *Beckstead v. Price*, ___ Idaho ___, ___ P.3d ___, 08.13 ISCR 660, 2008 Slip Op. No. 84 (June 17, 2008). To establish prescriptive rights, a party must prove by clear and convincing evidence “use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with actual or imputed knowledge of the owner of the servient tenement; (5) for the statutory period.” *Id.*, quoting *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005).

The law of adverse or prescriptive rights applies to water right as well as for easements to divert and carry water across the land of another. *Pflueger v. Hopple*, 66 Idaho 152, 155, 156 P.2d 316, 318 (1945) (“That the right to the use of water for irrigation or other lawful purposes may be lost by one and acquired by another by prescription is settled beyond controversy in this jurisdiction.”); *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002) (confirming district court’s finding of prescriptive right to an irrigation ditch).

The undisputed facts in this case establish an exclusive, prescriptive right to use, maintain and convey water from the Well. Mr. Jensen drilled and began using the Well in December 1967. His use was open and notorious, adverse and under a claim of right with knowledge of the

Whitteds' predecessors in interest. The facts on this score are not disputed. The Cusics, Mr. Whitted's predecessors in interest, knew Mr. Jensen drilled the well, believed it was on their property, but acquiesced to the continued use of it. The prescriptive right therefore arose in December 1972, five years after Mr. Jensen drilled and began using the Well. As stipulated by the parties and confirmed by the testimony for Sarah Jane Smith and David Vastine in their respective affidavits, the use of the Well for the benefit of the SJ Smith Parcel continued unabated until the present. These undisputed facts satisfy the *Beckstead* factors and Sarah Jane Smith is entitled to a legal determination from the Court confirming her prescriptive title to the Well.

B. The scope of Jane Smith's prescriptive right is established in the chain of title.

Under *Beckstead*, the establishment of a prescriptive right requires the Court to define the scope of the prescriptive right being confirmed. The record in this case provides clear evidence of the established prescriptive rights.

As discussed above, the prescriptive rights to the Well came into existence in December 1972. Soon thereafter, Mr. Jensen described the scope of the prescriptive right in a deed, dated November 14, 1973 whereby the Jensens sold a partial interest in their property, which included the SJ Smith Parcel, to the Evans group. A copy of the deed is attached as Exhibit B to the Varin Affidavit. The deed makes express reference to the prescriptive rights to the Well:

A 10-foot by 10-foot parcel on which is located a well enclosed in a cement housing, which parcel is located approximately in the Southeast corner of the Southwest Quarter of Section 14 in Township 1 South, Range 2 West, Boise Meridian, and which well is connected by pipelines to the property first described hereinabove.

This same description was included in the deed from the Evans group to the Vastines (Exhibit B to the Vastine Affidavit) and carries through the chain of title, ending with a

conveyance to Sarah Jane Smith (Exhibits B and C to the Smith Affidavit).² The later deeds include the same language with a clarification concerning the benefited parcel.

A 10-foot by 10-foot parcel on which is located a well enclosed in a cement housing, which parcel is located approximately in the Southeast corner of the Southwest Quarter of Section 14 in Township 1 South, Range 2 West, Boise Meridian, and which well is connected by pipelines to property in the Northwest Quarter of Section 23 in Township 1 South, Range 2 West, Boise Meridian; together with a permanent easement and right-of-way for the purpose of conveying water through said pipelines and maintaining, servicing and repairing the well and pipelines herein described.

In 1992 as part of its purchase of the S.J. Smith Parcel from the Vastines, Canyon Cattle Company commissioned an updated survey and legal description for the parcel. As a result, the surveyor generated a more precise description and depiction of the location of the Well and the associated easement, copies of which are attached as Exhibits K and L to the Smith Affidavit. The description confirms the scope of the prescriptive right for a ten-foot by ten-foot parcel surrounding the Well along with a 15-foot wide access and maintenance easement along the described centerline. The Affidavits of Sarah Jane Smith and David Vastine confirm their use of the Well and associated easements consistent with this description. Accordingly, the Court should confirm the scope of Sarah Jane Smith's prescriptive rights consistent with the description and depiction included as Exhibits K and L to her affidavit.

II. The Whitteds have no right to use the Well.

Mr. Whitted by his objection has put in play the issue of the ownership and rights concerning the Well. As a consequence, judicial determination of the Whitted's rights to use the Well is also at issue and ripe for determination by this Court. Sarah Jane Smith and David

² The Vastines did not originally include this language concerning the Well in their deed to Canyon Cattle Company (Exhibit A to the Vastine Affidavit), but as indicated in paragraph 9 of the Vastine Affidavit, it was always his intent to convey the Well. The Vastines cleared any confusion that may have existed about this by delivering the Quitclaim Deed to Canyon Cattle (Exhibit B to the Smith Affidavit).

Vastine in their respective affidavits establish that for a period of record from 1987 to the present, the Whitteds and their predecessors in interest have never made any use of the Well and were precluded from doing so. Accordingly, the Court should decree the Whitteds have no right to use the Well and that Sarah Jane Smith's ownership of the Well and the associated easement is exclusive of any right claimed by the Whitteds to use the Well.

III. Idaho law prohibiting acquisition of water rights in trespass does not preclude establishment of prescriptive rights to the Well.

The Whitted's sole contention in defense of Sarah Jane Smith's ownership and right to use of the Well is that Idaho law precludes the establishment of a water right in trespass. Under the Whitted's view of the law, forty years of continuous use of the Well by Sarah Jane Smith and her predecessors would not give rise to any rights of use to the Well, and never could, so long as the Well is located on their property. To adopt the Whitted's theory, the Court would have to conclude the law of prescription and adverse possession have no place in Idaho water jurisprudence, and there simply would be a black letter law against establishing a ground water point of diversion on another's property.³ The law does not support this contention.

Although Idaho case law includes the general principle that a water right cannot be obtained by trespass, the cases by no means stand for the proposition that one cannot establish a ground water point of diversion by prescription. See e.g. *Marshall v. Niagra Springs Orchard Co.*, 22 Idaho 144, 125 P. 208 (1912). On the contrary, the early cases establishing the no trespass rule simply hold that the constitutionally-based right to divert and appropriate the unappropriated waters of the State itself does not provide would-be appropriators the right to trespass on the property of another for the purpose of making the appropriation. The cases

³ Idaho statutes provide an express private right to condemn a right-of-way for a conveyance facility leaving from a stream. I.C. § 42-1102. Whether or not this statute applies to ground water has not been decided. Arguably it does. But the statute is not at issue here because there is no right to condemnation sought in this case.

require the appropriator to obtain the right to occupy another's ground via an independent legal theory.

The 1912 *Marshall* case established the no water right in trespass law in Idaho. In *Marshall* the Supreme Court reversed the district court's approval of a permit holder's request to condemn a strip of his neighbor's ground needed to complete the diversion works authorized by a water right permit. The court held that since the permit holder had illegally trespassed to obtain the information necessary to develop the application for permit, the permit was void. *Id.* at 212. The decision goes on to explain that the right to use another's property must either be express or derived independent of the right to appropriate water—including right by prescription:

“One may not acquire a water right on the land of another without acquiring an easement in such land. *** And an easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription.”

Marshall, 22 Idaho at 149; 125 P. at 212 (emphasis added), quoting *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081 (1909).

In a later case discussing *Marshall* the Supreme Court reiterated and clarified that the problem in *Marshall* was the pre-permit trespass, and so long as the permit application itself is not based on a trespass, a permit is valid even if it identifies the land of another as its point of diversion or place of use:

Under section 3, art. 15, of the Constitution, and article 1, c. 218, of Idaho Compiled Statutes, plaintiff, though having no right or title in the land upon which the waterfall is situated, had a lawful right to make application for a permit to put it to a beneficial use and having acquired the necessary data for his application without going upon the land, the permit issued upon his application was lawful.

Bassett v. Swenson, 51 Idaho 256-57, 259, 5 P.2d 722, 724-25 (1931). Of course, consistent with *Marshall*, the permit holder in *Bassett* then had to obtain legal access to the point of diversion in another manner—private condemnation in that case.

A third important case in the no water right in trespass jurisprudence is *Idaho Power Co. et al. v. City of Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941). This decision confirms the rule in *Bassett* that a permit is not void if there was no actual trespass in gathering the information to support the application, but the case then goes on to establish that trespass issue is not even relevant where the party complaining of the trespass did not hold title at the time of the alleged trespass:

At any rate, it would make no difference with the respondent how it [the survey in the permit application] was made, for the reason that the respondent had no interest in the premises at that time; and such trespass would not have injured or concerned respondents.

Id., 62 Idaho at 353, 111 P.2d at 1090. As discussed in more detail below, this law has direct applicability in this case.

In summary, these cases defining the no water right in trespass rule establish that a water right permit may be issued even where it involves the right of another, but such a permit does not itself give rise to a property right on the others' property. This right must be obtained independently. And as discussed above in Section I.A., Idaho has long recognized the doctrines of adverse possession and prescription with regard to water rights and the acquisition of prescriptive of rights to divert and convey water across the land of another. *Pflueger v. Hopple*, 66 Idaho at 156 P.2d at 318; *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 55 P.3d 304 (2002).

The facts in this case do not present the type of trespass that lead to the voiding of the permit in the *Marshall* case. Principally, there is no allegation that the information included in

the application for permit 63-7539 was obtained in trespass. It is difficult to even imagine how a trespass would be possible under the facts in this case where the simple nature of the permit application required only a basic map and quarter-quarter description (as opposed to the detailed survey work required at the time of *Marshall*).

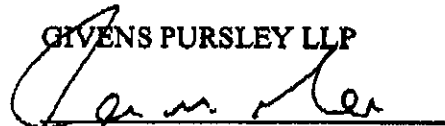
Even if one determined that the permit application did involve trespass, the fact the permit and license for right 63-7539 include a second point of diversion in Section 23, which undisputedly does not include any trespass, would preclude voiding the entire water right and provides an independent water right platform upon which Sarah Jane Smith or her predecessors could establish a second point of diversion through prescription.

IV. Additionally, it is unclear whether Whitted even has standing at this time to argue that the Well should not be recognized based on the no trespass rule given the language from the *Idaho Power* case stating that such a complaint by an owner subsequent to the trespass is immaterial.

CONCLUSION

In summary, Idaho law stating that a water right cannot be established in trespass generally has a narrow application focused on the application for permit and has no application in this case. Accordingly, given the undisputed facts establishing the existence and scope of prescriptive rights to the Well described above, the Court should enter summary judgment in favor of Sarah Jane Smith dismissing Mr. Whitted's objection, affirmatively establishing Sarah Jane Smith's prescriptive right to use, maintain and convey water from the Well and ruling that the Whitteds hold no right, title or interest of any nature to the Well.

Dated this 31~~st~~ day of July, 2008.

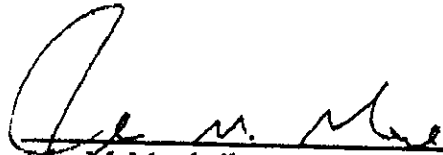
GIVENS PURSLEY LLP

John M. Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of July, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Craig Whitted
7144 Warren Spur Road
Melba, Idaho 83641-5228

☒ U.S. Mail
☐ By hand
☐ Overnight
☐ Facsimile



John M. Marshall