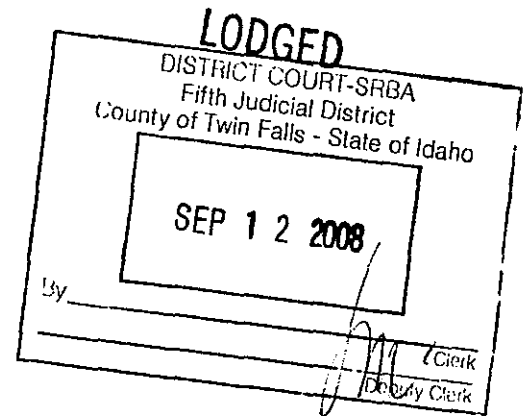


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In re: SRBA

Case No. 39576

Subcase No.: 63-7539

**CRAIG WHITTED'S MEMORANDUM IN
 OPPOSITION TO SMITH'S MOTION TO
 STRIKE CROSS-MOTION FOR
 SUMMARY JUDGMENT AND ALL
 SUPPORTING DOCUMENTS**

COMES NOW Craig Whitted ("Whitted"), by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this memorandum in opposition to Sarah Jane Smith's ("Smith") Motion to Strike Cross-Motion for Summary Judgment and All Supporting Documents (henceforth "Motion to Strike").

Smith argues that Mr. Whitted's Cross-Motion for Summary Judgment and Supporting Memorandum and Affidavits should be stricken because, in Smith's view, the Motion and supporting documents "raise new factual and legal issues." *Motion to Strike*, p. 2. Smith asserts that at a pre-trial conference held on July 1,

2008, at which Mr. Whitted appeared *pro se*, a previously scheduled trial was vacated on the expectation that the issues in contention were legal rather than factual, and that this matter could thus be resolved on summary judgment.

Smith's argument is without merit. The issues addressed in Mr. Whitted's Cross-Motion and supporting documents were those already raised by Smith herself. Smith appears to be arguing that she can raise new issues, but that Mr. Whitted is prohibited from offering a response.

The issues discussed in Mr. Whitted's Cross-motion for Summary Judgment and the supporting documents are (1) whether Smith can establish a water right by trespass, and (2) whether Smith possesses prescriptive rights over the Whitted property. Both of those issues had already been raised in prior submissions, most notably in Smith's own memorandum in support of her motion for summary judgment.

As to the first issue, Whitted has from the beginning maintained that Smith cannot obtain water rights by trespass. In Smith's Memorandum in Support of Motion for Summary Judgment she admits that Mr. Whitted had already raised that issue, which Smith attempts to rebut at some length. *Sarah Jane Smith's Memorandum in Support of Motion for Summary Judgment*, p. 7-10. Since the issue had already been raised and discussed in prior submissions, including those proffered by Smith herself, she cannot now claim that the issue is newly raised.

As to the second issue, that of prescriptive rights, that issue was raised by Smith herself in her Memorandum in Support of Motion for Summary Judgment.

Almost her entire memorandum in support of summary judgment was devoted to arguing that she was not a trespasser on the Whitted property because she allegedly had prescriptive rights. Smith also submitted Affidavits purporting to support her theory. Now, astonishingly, Smith appears to be arguing that she is entitled to raise prescriptive rights as a new issue, but Mr. Whitted is somehow barred from *responding* and pointing out that no, Smith does not have such rights because she cannot meet the elements of either adverse possession or an easement by prescription.

Mr. Whitted is entitled to respond to the arguments Smith herself has raised. Accordingly, Mr. Whitted respectfully requests that the Court deny Smith's Motion to Strike.

DATED this 12th day of September, 2008.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.



Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 2008, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery
Idaho Department of Water Resources, c/o Nicholas B. Spencer 322 E. Front Street Boise, Idaho 83720	☐ First Class Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight Delivery



Reid W. Hay