

RECEIVED

JUN 13 1995

Department of Water Resources
Adjudication Bureau

6-9
RECEIVED

JUN 12 1995

OFFICE OF THE
ATTORNEY GENERAL

Moving Party: United States of America

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division

PETER C. MONSON
Attorney, Indian Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, Suite 945 North Tower
Denver, Colorado 80202
(303) 294-1900/1950

Counsel for the United States of America

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	)	Sub-case Nos. 01-10248; 27-11560
	)	
CASE NO. 39576	)	JOINT OPPOSITION TO BODILY'S
	)	MOTION TO VACATE AND RESET ORDER
	)	SETTING SUBCASES FOR TRIAL AND
	)	PRETRIAL SCHEDULING ORDER
	)	
	)	

DESCRIPTIVE SUMMARY

This is the Joint Opposition by the United States, State of Idaho and the Shoshone-Bannock Tribes to Kim Bodily's Motion to Vacate and Reset Order Setting Subcases for Trial and Pretrial Scheduling Order.

INTRODUCTION

On May 31, 1995, Kim Bodily filed a motion to vacate the scheduled trial date of June 26, 1995 and to re-open discovery to permit Mr. Bodily to conduct formal discovery which he chose not

JOINT OPP. TO BODILY'S MOTION TO VACATE, ETC.
SUB-CASE NOS. 01-10248; 27-11560 -- 1

to do during the discovery period set in this Court's March 21, 1995, Order Setting Subcases for Trial and Pretrial Scheduling Order. The motion makes unsupported allegations that are not based on personal knowledge of the affiant and that constitute inadmissible hearsay statements. The undersigned parties strenuously oppose Mr. Bodily's motion and urge the Court to deny it.

FACTS

The relevant facts for the purpose of this motion are these:

1. On May 31, 1994, exactly one year prior to filing the instant motion, Kim Bodily filed identical objections to the Director's Report as to water right Nos. 01-10248 (Fort Hall Irrigation Project right to Snake River) and 27-11560 (Fort Hall Irrigation Project Right to Sand Creek). Both rights were recommended in the Director's Report as "water rights held by the United States for use on Non-Indian owned land on the Fort Hall Irrigation Project and for the Bureau of Indian Affairs, Fort Hall Agency." Director's Report, Section 4, at 50. Mr. Bodily raised objections to four elements of the water rights: (1) Name and address (which he believed was in the Shoshone-Bannock Tribes); (2) total quantity of water used in cubic feet per second; (3) the number of irrigated acres within each forty acre subdivision; and (4) "other" -- "the deletion of 4.06 of my acres for watering." Mr. Bodily signed the requisite verification statement, although he failed to have his statement notarized.

2. By Motion dated February 23, 1995, and served February 24, 1995, the undersigned parties moved to dismiss the objections filed by Mr. Bodily. This Motion was denied as to Mr. Bodily's objections by Order of this Court dated May 11, 1995.

3. On March 5, 1995, Margaret J. King, of the firm of Simms & Stein, P.A., entered an appearance on behalf of Mr. Bodily in the sub-cases created by his objections.

4. On March 14, 1995, this Court held a status conference to discuss pre-trial scheduling matters. Ms. King and Mr. Richard Simms, appearing pro hac vice, appeared on behalf of Mr. Bodily. At that conference, a variety of issues were discussed, and an agreement among counsel and with the Court was reached as to an appropriate trial date and intermediate pre-trial deadlines.

5. The Court subsequently entered an "Order Setting Subcases for Trial and Pretrial Scheduling Order" on March 21, 1995. Among other things, the Court established a discovery cut-off date as of May 15, 1995; a deadline for filing pretrial motions as of May 31, 1995; and a trial date as of June 26, 1995.

6. On April 5, 1995, counsel for the undersigned parties deposed Mr. Bodily concerning his objections, and reviewed documents provided by Mr. Bodily in response to an accompanying subpoena duces tecum.¹ Mr. Simms defended the deposition.

¹ This fact refutes the assertions in the Affidavit of Richard A. Simms, dated May 31, 1995, that "No formal discovery on either side has been conducted with respect to the issue of ownership." On the contrary, Mr. Bodily was asked several

7. Mr. Bodily and his counsel conducted informal discovery upon the United States, both before and after the close of formal discovery, and were provided copies of all documents requested. They did not choose, however, to conduct any formal discovery prior to the discovery cut-off date established in this Court's Order, nor did he at any time prior to filing this motion seek leave to extend that discovery cut-off date.

ARGUMENT

Mr. Bodily's motion should be denied. As the foregoing recitation of facts demonstrates, it is filed solely because of his own lack of diligence in investigating the facts which form the basis for his objections. Mr. Bodily has had several years in which to investigate facts related to his objections, including his claim to ownership of the subject water rights, yet has waited until after the discovery cut-off date to conduct any investigations of that issue. That he filed the objections pro se does not relieve him of his obligations under this Court's Administrative Order No. 1 and I.R.Civ.P. 11 to properly

questions by counsel as to his claim of ownership. See Deposition of Kim G. Bodily, p. 17, ll.6-11; p. 18, ll. 16-18; p. 21, ll.12-18; p. 37, l.14 - p. 38. l. 22. (A copy of the deposition transcript is attached.) To summarize his claim of ownership, he said, "[w]hen I filed the objection I felt that way. I still feel that way. I am not sure that's a point that I have a lot of chance of winning." Id., at 21, ll. 16-18.

Should the Court grant Mr. Bodily's motion to re-open discovery, the undersigned parties reserve the right to conduct any discovery permissible under the rules and any court order, including deposing Mr. Bodily again, to determine what new facts he may possess which give him greater optimism in his "ownership" objections.

investigate his assertions and, in any event, such concerns became irrelevant when he retained the services of counsel on or before March 5, 1995.

Mr. Bodily, and his counsel, complain that the Court's decision not to dismiss his objections somehow prejudices his ability to conduct discovery on the ownership issue, alleging that "Kim Bodily has not had an opportunity to conduct further discovery on this limited issue of ownership," since the discovery cut-off date was to expire three days after the Court's order denying the motion to dismiss. Affidavit of Richard A. Simms, at 2, ¶ 5. This allegation is simply wrong -- the issue of ownership was raised by Mr. Bodily himself, nearly one year prior to the discovery cut-off date, and was the subject of discovery by the undersigned respondents. Since entering an appearance for Mr. Bodily, counsel has had an opportunity to conduct formal discovery into that issue for over two months, to the same extent that the other parties have had. He has simply chosen not to do so.²

In his Affidavit, counsel for Mr. Bodily complains that "[i]t has been reported that some of the historical records were

² In the Affidavit of Richard Simms, he posits that the Court has limited the presentation of evidence as to ownership only. While we did not read the Court's order that way, any ambiguity as to the issues to be tried have now been resolved by the Court's Order Granting Reconsideration of Order Denying Motion to Dismiss Objection of Kim Bodily, entered June 6, 1995. Evidence as to all objections raised by Mr. Bodily -- ownership as well as extent of beneficial use of water on Mr. Bodily's land -- "will be heard at trial." Id., at 4.

lost or destroyed." He neither identifies what records are alleged to be "lost or destroyed" nor offers any support for his unsubstantiated hearsay statement, and it should be disregarded for that reason alone. In any event, the fact that certain unidentified records may be missing from an agency's operational office is no excuse for Mr. Bodily's delay in conducting needed discovery. Such records as Mr. Bodily believes are needed to support his objections should have been sought prior to filing his objections; within the one year period between the filing of the objections and the close of discovery; or the two month period since Mr. Bodily has been represented by counsel. Perhaps the records sought could be found in a records center, archive, or county records office. No mention is made of any efforts to determine the whereabouts of such records in a timely manner.

Mr. Bodily makes additional unfounded, unverifiable, hearsay statements to the effect that, "[b]ased on the advice of the Idaho Department of Water Resources, confirmed by statements of the United States and the Shoshone-Bannock Tribes, Kim Bodily, acting pro se, did not file a claim to the water rights in question; relying on the representation of the Idaho Department of Water Resources, the United States, and the Shoshone-Bannock Tribes, he had no reason to do so." The statements are pure hearsay within hearsay and are unsupported by any affidavit of Mr. Bodily or any other witness. Moreover, they fail to identify any person in any of the identified government entities who made such statements or representations, and thus cannot be verified.

They should be disregarded by the Court for those reasons alone. However, even if true, they provide no justification for Mr. Bodily's actions. As the evidence before the Court has shown, neither Mr. Bodily nor any other member of the Fort Hall Water Users Association have filed any competing claims to the water rights claimed by the United States in this proceeding. That fact, in and of itself, demonstrates the contemporary understanding of the water users that the subject Project water rights are held by the United States, and not by the water users as Mr. Bodily now claims.

Mr. Bodily and Mr. Simms assert that, if allowed to conduct discovery, they anticipate being able to resolve this matter on summary judgment. The time for filing such motions, of course, expired on May 31, 1995. In any event, we have no way of assessing the chances of there being no material facts in dispute, since we do not know what facts Mr. Bodily or Mr. Simms may find material and undisputed.³ Perhaps it may be possible, during the pretrial conference or otherwise, to reach a stipulation as to certain undisputed facts. We do not need 60 days of discovery to accomplish that end. We stand ready to consider any proposed stipulations of fact that Mr. Bodily cares

³ In the Affidavit of Richard A. Simms, as well as in the motion itself, wholly unsubstantiated allegations are made which go to the merits of the ownership issue. The undersigned parties do not believe it appropriate to address those allegations at this time. In doing so, we do not concede the truth of any of those allegations. It will be incumbent upon Mr. Bodily to prove his allegations at trial.

to present prior to trial.⁴

The Court has frequently underscored the need for firm pre-trial deadlines which are necessary for the Court to render justice in a timely way. The undersigned parties appreciated the Court's deadlines and are prepared to go to trial as scheduled on June 26, 1995. Counsel for all parties so indicated during the March 14, 1995 scheduling conference. There is no just cause for further delay in this matter.

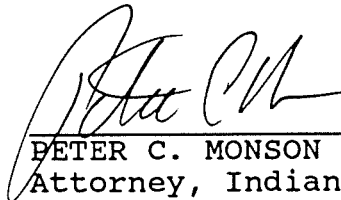
CONCLUSION

For the foregoing reasons, Mr. Bodily's motion to vacate the previously entered trial date must be denied. Given the failure of Mr. Bodily to avail himself of formal discovery opportunities that have existed for over one year since filing his objections, as well as the informal discovery opportunities available prior to and following the filing of his objections, no just cause exists to re-open discovery and vacate the trial date.

Dated this 5th day of June, 1995.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General



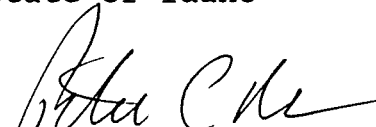
PETER C. MONSON
Attorney, Indian Resources Section
Environment and Natural Resources
Division

⁴ We also await Mr. Bodily's response to the offer of judgment which was presented to him, through his counsel.

U.S. Department of Justice
999 18th Street, Suite 945 North Tower
Denver, Colorado 80202
(303) 294-1950

 per teleph. auth.

CLIVE J. STRONG, ESQUIRE
Deputy Attorney General
State of Idaho

 per teleph. auth.

CANDY JACKSON, ESQUIRE
Tribal Attorney
Shoshone-Bannock Tribes

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1995, I served a true and correct copy of the foregoing **Joint Opposition to Bodily's Motion to Vacate and Reset Order Setting Subcases for Trial and Pretrial Scheduling Order** by depositing a copy thereof in the United States mail, first-class, postage prepaid, upon:

Clerk of the SRBA Court (original)
District Court
P. O. Box 2707
Twin Falls, ID 83303-2707

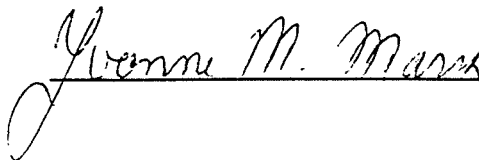
Chief, Natural Resources Division
Office of the Attorney General
STATE OF IDAHO
P. O. Box 44449
Boise, Idaho 83711-4449

Richard Simms
Margaret J. King
Simms & Stein, P.A.
102 Aspen Lakes Drive
P.O. Box 3329
Hailey, ID 83333

Candy L. Jackson
Jeanette Wolfley
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, ID 83203

John A. Rosholt
Norman M. Semanko
Rosholt, Robertson & Tucker
142 3rd Avenue North
P.O. Box 1906
Twin Falls, ID 83303-1906

United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street
Box 33
Boise, Idaho 83724

_____

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

) Sub Case Nos. 01-10248;
) 27-11560
)
)
)

COPY

ORAL DEPOSITION OF KIM BODILY
Taken on April 5, 1995

APPEARANCES:

For the Shoshone-
Bannock Tribes:

CANDY L. JACKSON
Attorney at Law
P. O. Box 306
Fort Hall, Idaho
DEPT. JUSTICE ENVIRONMENT DIV.
DENVER, COLO.

For the State of Idaho:

DAVID J. BARBER
Attorney at Law
Statehouse
Boise, Idaho

For the U.S. Department
of Justice:

PETER C. MONSON
Attorney at Law
999 18th Street, North Tower
Denver, Colorado

For the Deponent:

RICHARD A. SIMMS
MARGARET J. KING
Simms & Stein
Attorneys at Law
102 Aspen Lakes Drive
Hailey, Idaho

Also Present:

Gail Martin
Ross Waples
Len Brenchley
Alan Oliver
Floyd Johnson

I N D E X		Page 2
1		
2		
3	Examination By:	Page
4		
5	Ms. Jackson	3
6	Mr. Monson	22
7	Mr. Barber	26
8	Mr. Simms	48
9		
10	Exhibits:	
11		
12	No. 1 - Objection 21-10248	10
13	No. 2 - Objection 27-11560	10
14	No. 3 - Engineering Plat	30
15	No. 4 - Diagram of Property	30
16	No. 5 - Aerial Photograph	41
17	No. 6 - Diagram of Property	42
18		
19		
20		
21		
22		
23		
24		
25		

Page 3

1 BE IT REMEMBERED that on the 5th day of April,
2 1995, at the hour of 3:45 p.m. the deposition of KIM
3 BODILY, produced as a witness at the instance of the
4 Shoshone-Bannock Tribes in the above-entitled action now
5 pending in the above-named court, was taken before PAUL
6 D. BUCHANAN, CSR #7 and notary public, State of Idaho,
7 in the Offices of the Tribal Attorney, Fort Hall
8 Business Center, Pima and Bannock Avenue, Fort Hall,
9 Idaho.

10

11 WHEREUPON, the following proceedings were had:

12

13 KIM BODILY,
14 called at the instance of the Shoshone-Bannock Tribes,
15 having been first duly sworn, was examined and testified
16 as follows:

17 EXAMINATION

18 BY MS. JACKSON:

19 Q. Mr. Bodily, if you could state your name and
20 address for the record?

21 A. Kim Bodily, 11696 North Philbin Road,
22 Pocatello, Idaho.

23 Q. My name is Candy Jackson. I am an attorney
24 with the Shoshone-Bannock Tribes and I am going to be
25 starting with the questions here. If you can't

Page 4

1 understand my question, please stop me and if you can't
2 hear, again stop me and we will try to make it louder
3 for you to understand.

4 A. Okay.

5 Q. That address, is that your residence?

6 A. Yes.

7 Q. Is that in Bannock County?

8 A. Yes.

9 Q. And is that the only land you own in Bannock
10 County?

11 A. No.

12 Q. What other land do you own?

13 A. I have a house over on Fairbanks.

14 Q. In Pocatello?

15 A. In Pocatello, yes.

16 Q. Is that just a residence and a lot or is it --

17 A. Yes, it's just a rental house. I just barely
18 bought it.

19 Q. Going back to your current residence, how much
20 acreage is there on that particular --

21 A. Seven acres.

22 Q. About how much of that encompasses the house
23 and the lawn?

24 A. Oh, I don't know, the house is, what, 1,100
25 square feet.

Page 5

1 Q. Maybe an acre?

2 A. For the lawn?

3 Q. For the immediate --

4 A. Yeah.

5 Q. What else do you utilize property for?

6 A. To keep the neighbors from being too close.

7 Q. Do you irrigate the rest of the acreage?

8 A. Yes.

9 Q. And how do you irrigate?

10 A. Flood irrigate.

11 Q. And what do you irrigate for?

12 A. I have planted trees and just to keep it
13 green.

14 Q. Do you have any livestock?

15 A. I do not.

16 Q. Do you plant any hay or grain or anything like
17 that?

18 A. No; an occasional garden.

19 Q. Vegetable garden?

20 A. Yes.

21 Q. About how big of a garden do you usually --

22 A. Oh, I don't know, 20 by 30.

23 Q. But not like an acre or two.

24 A. No.

25 Q. When did you buy the property?

Page 10

Page 1

1 MS. JACKSON: Let's mark your objection forms
2 as Bodily Exhibits Nos. 1 and 2.

3 (Deposition Exhibit Nos. 1 and 2 marked
4 for identification.)

5 Q. You are involved in the Fort Hall Water Users
6 Association; is that correct?

7 A. I am now, yes.

8 Q. And how long have you been involved with that
9 association?

10 A. Involved or --

11 Q. How long have you been attending meetings?

12 A. Since -- I am not sure on the date. It's the
13 one they sent out the letter and when they deducted some
14 of my property since that time. It could have been,
15 let's see, March of '93. I think that's probably it.

16 Q. And since that time you have been attending
17 the meetings?

18 A. Yes.

19 Q. And then you were recently appointed to the
20 board --

21 A. I was elected at the meeting in January.

22 Q. Prior to the discussion of 1993, I think, had
23 you been involved at all in the Fort Hall Water Users
24 Association?

25 A. Other than being a member by being on the same

1 deletions. I have a copy of my 1993 payment for
2 irrigation water. I have the map that shows the deleted
3 parcel of my land --

4 Q. Who was that provided by -- that was provided
5 to you, that's not your map?

6 A. No, this came from HKM, Department of
7 Interior. I have a letter that I sent to Mr. Oliver
8 explaining that I didn't agree with the deletions --

9 Q. What was the date of that letter?

10 A. That one is September 27, 1993. And I have a
11 meeting from Duane Thompson, it's a notice of meeting to
12 resolve discrepancies.

13 Q. Is it dated?

14 A. March 19, 1993. This (indicating) is the same
15 map I had before. I have an aerial photography shot of
16 the area that I live in. It shows my parcel.

17 Q. You were able to identify your parcel on that
18 map?

19 A. Yes. And I have a copy of the subdivision
20 showing my parcel. And I have two letters, one from
21 Gaylen L. Bodily, who is my father, and one from Eugene
22 J. Westwood testifying to the fact that I have watered
23 the property since I have owned it.

24 Q. What are the date of those letters?

25 A. October 17, 1993, and October 15, 1993.

Page 11

Page 1

1 project, no.

2 Q. Were you aware that there was an association
3 prior to you becoming involved?

4 A. Yes.

5 Q. Were there meetings that you saw, that were
6 noticed up, perhaps, that you just didn't attend before
7 that?

8 A. Yes.

9 Q. Did you bring some papers with you?

10 A. Yes.

11 Q. Are those part of the objections or are those
12 in addition?

13 A. These are the ones that I was directed to
14 bring in the subpoena.

15 Q. Okay, you do have some papers. Would you
16 identify what you brought there for us.

17 A. Oh, let's see, this one is a statement of
18 concern from the Fort Hall Water Users board on the
19 meeting of March of '93. I have a letter on U.S.
20 Department of Interior letterhead but it came in an HKM
21 envelope, so I am not sure what the connection there is,
22 showing that they deleted much of my acreage. I have a
23 letter from Alan Oliver on, let's see, it's a follow-up
24 letter from -- announcing the meetings where we could
25 meet with the people on our project -- or on our land

1 Q. Right before the letters there was a map, I
2 believe, of the subdivision.

3 A. Yes.

4 Q. Was that your map or was that provided --

5 A. This was provided when I bought the property.

6 Q. So that was your provision of the map.

7 A. Yes.

8 Q. How much was your acreage going to be reduced
9 on your first notice by the Department of Interior
10 through HKM?

11 A. Approximately four of the seven acres.

12 Q. Were going to be deleted?

13 A. Yes.

14 Q. What happened after you found out about that?

15 A. Then I attended the first meeting at Tyhee
16 school and the representatives there from the various
17 agencies said that if we had a discrepancy, to make an
18 appointment out here at Fort Hall to come out and talk
19 to them and they would take care of it.

20 Q. And did you do that?

21 A. Yes, I did.

22 Q. And who did you set up the appointment with,
23 do you remember?

24 A. Yes, it was Jeff Peppersack, Ross Waples, and
25 Leland -- is it Miller?

Page 18

Page 2

1 A. Yes, I wanted my 4.06 acres added back into
2 the total use for the project and returned to my use.
3 Q. What do you mean "and returned to your use"?
4 A. Well, to my property, not just to the project
5 itself, but to my property. And it said check here if
6 you are submitting documents, which I did, and I
7 submitted a videotape, pictures of the property,
8 statement from Gene Westwood, a statement from Gaylen
9 Bodily, aerial photo of my property and a property map.
10 Q. And is that what's attached?
11 A. That is what is attached, yes, a copy of the
12 letter from Gene Westwood, Gaylen Bodily, the aerial
13 photo, the map showing the deleted acreage, and these
14 are copies of the pictures that show the land as being
15 used or that it was not possible to deliver all of the
16 water allotted to me, to my property. And a copy of the
17 real estate purchase agreement where it says in there
18 that I purchased the water right.
19 Q. Did you have an attorney with your real estate
20 transaction?
21 A. I did not, no.
22 MR. SIMMS: Also we pursuant to the subpoena
23 brought a copy of the videotape but I assume since you
24 already have one you don't need this one.
25 MS. JACKSON: I think you can assume

1 said there was more that was originally reduced and yo
2 did get some back.
3 A. Yes. I don't have that map. I believe that's
4 how it went, that I got a tenth of an acre or so added
5 back.
6 Q. And in terms of growing these trees, what is
7 the purpose of having trees on the property?
8 A. Wind break and screen.
9 Q. Is there any commercial, anticipated
10 commercial use of the trees?
11 A. No.
12 Q. Any sale or --
13 A. No.
14 Q. For seed or anything like that?
15 A. No.
16 Q. I believe the other objections, let's take a
17 quick look at that. It's probably very similar. Right
18 27-11560, and that's Deposition Exhibit No. 2, are you
19 responses substantially the same?
20 A. I think they are word for word.
21 Q. Did you provide different pictures with this
22 water right than with the other water right?
23 A. I don't believe I did, I think they are the
24 same.
25 (Pause in proceedings.)

Page 19

Page 2

1 correctly. Mr. Monson brought one over today.
2 MR. MONSON: For the record, we did make a
3 copy of what was at the courthouse. There was some
4 fluttering, I guess, for lack of a technical term, in
5 the videotape, and I don't know if that's in the
6 original that was with the court or if there is a better
7 copy someplace. We might want to look at that, I think
8 perhaps the one you brought even today, if there is
9 time. Not as part of the deposition but just to make
10 sure --
11 MS. JACKSON: Let's go off the record.
12 (Discussion off the record.)
13 MS. JACKSON: We had a brief discussion about
14 photographs and for Ms. King, attorney for Mr. Bodily,
15 to share the actual pictures rather than photocopies of
16 the pictures so we can see them a lot clearer than
17 what's attached.
18 Q. (By Ms. Jackson.) Mr. Bodily, do you believe
19 that it would be reasonable to reduce any of your
20 acreage as far as the amount of water being utilized on
21 it?
22 A. No.
23 Q. You indicate that it was 4.06. Was this the
24 amount of the acreage that was reduced, was that the
25 total amount that was originally reduced? I thought you

1 A. No, they are the same pictures, it's all the
2 same information.
3 Q. If you were given back the 4.06 acres, would
4 that end your objection, if the land was restored that
5 through the project, the 4.06, enough water for the
6 4.06, 12 something, 13, acre feet of water, would that
7 end your objection?
8 A. Probably.
9 Q. Probably it wouldn't end --
10 A. I would have to look -- are you making me an
11 offer?
12 Q. I am just wondering, you had indicated you
13 thought that you owned the water right. Is that
14 something that you are seeking through this process as
15 well?
16 A. When I filed the objection I felt that way. I
17 still feel that way. I am not sure that's a point that
18 I have a lot of chance of winning.
19 MS. JACKSON: I don't have any more questions
20 on this particular matter. A lot of that is because I
21 guess the tribes were not directly involved in the
22 reduction of the acreage. So I will turn that over to
23 other counsel.
24
25

Page 26

1 you very much for your help and time.
2 EXAMINATION
3 BY MR. BARBER:
4 Q. My name is David Barber, I am a deputy
5 attorney general and I just have a few questions for
6 you. First, you have been sitting there a while. Do
7 you need a break or anything?
8 A. No.
9 MR. BARBER: Off the record.
10 (Discussion off the record.)
11 Q. Just like with prior counsel, if there is
12 something I say that you don't understand or I mumble or
13 something like that and you need a clarification, just
14 stop me and I will try my best to make it so you can
15 understand.
16 A. Okay.
17 Q. What my question is. I think you indicated
18 earlier that you had lived in Pocatello prior to your
19 purchase of the property at Philbin Road; is that
20 correct?
21 A. That's correct.
22 Q. What was the year you began living in the
23 Pocatello area?
24 A. The day I was born.
25 Q. What day was that?

Page 27

1 A. It was August 23.
2 Q. What year, sir?
3 A. 1951.
4 Q. And when did you become familiar with the
5 irrigation out of the Fort Hall Irrigation Project?
6 A. With the irrigation?
7 Q. Yes.
8 A. Well, I grew up -- I was born and raised in
9 the Hill Chase Irrigation Project, which is part of the
10 Fort Hall Irrigation Project.
11 Q. So that's part of the ceded area; is that
12 correct?
13 A. Yes, it's one of the associations in the
14 association.
15 Q. Have you, prior to your purchase of the
16 Philbin Road property, have you actually irrigated
17 property in the Fort Hall project area?
18 A. Yes.
19 Q. And in what capacity?
20 A. My parents owned and lived in the house.
21 Q. So what property did you irrigate, just the
22 lawn and stuff?
23 A. The lawn, correct.
24 Q. And is my understanding correct that you
25 graduated from high school, sir?

Page 28

1 A. That's correct.
2 Q. And after high school what education do you
3 have?
4 A. I have about, total credit numbers, 14 years
5 of full-time college work.
6 Q. What subject areas?
7 A. Let's see, kinesiology, athletic
8 administration, recreation, sociology, political
9 science, and your basic required courses, public
10 administration also.
11 Q. So what is your present line of work?
12 A. I am a schoolteacher.
13 Q. Where?
14 A. At the School District 25 here in Pocatello.
15 Q. Is that elementary school, high school --
16 A. Secondary, junior high.
17 Q. What classes do you teach?
18 A. I teach geography.
19 Q. Do you have any expertise as a hydrologist?
20 A. I do not.
21 Q. Or as an engineer?
22 A. I do not.
23 Q. If you were asked to measure water coming
24 through a head gate, would you have the expertise to
25 measure that water?

Page 29

1 A. No, but I could learn.
2 Q. I am sure you could. Now, you purchased this
3 property in approximately 1981, I believe; is that
4 correct?
5 A. I believe it was 1980, it might have been '81.
6 Q. Isn't the real estate agreement attached as a
7 part of the --
8 A. Very good, it is.
9 Q. -- of the objection, if you can refer to
10 that.
11 A. Yes, October of '81.
12 Q. And prior to your purchase you evidently had
13 looked at the property but did you know anything about
14 the irrigation of the property, what irrigation had
15 taken place on the Philbin Road property?
16 A. No.
17 Q. And are there any wells on the Philbin Road
18 property?
19 A. Yes.
20 Q. How many wells are there?
21 A. One.
22 Q. And is that an irrigation well, domestic well,
23 what is it?
24 A. It's a domestic well but I use it to water
25 areas of the lawn, also, from time to time.

Page 34

Page 3

1 A. It's pretty early for a garden.
2 Q. I wanted to know whether you started your
3 peas.
4 There is another block marked "building" down
5 here and I am pointing to the south -- is that the south
6 property line?
7 A. That is the south property line, yes.
8 Q. Is that another large building?
9 A. Yes, it is.
10 Q. Why don't we put a direction on there just so
11 I can get oriented. Where is north?
12 A. (Witness indicates.)
13 Q. Now, we have this ditch going across there.
14 Can you show me where the trees that you planted are
15 approximately located?
16 A. They are down this side of the property line
17 and down this side of the property line and another row
18 across here and then several others scattered throughout
19 the property (indicating).
20 Q. Mr. Bodily, it's going to be real difficult
21 for me to understand when I get back to the office and
22 take your description, so why don't we mark something on
23 there so we can understand what the trees are. I just
24 want to understand what your situation is out there.
25 A. No problem.

1 them out there?
2 A. No, eventually I plan for that to be pasture.
3 Q. And when you say pasture, do you intend to get
4 some animals?
5 A. Yes.
6 Q. So can you sort of rough mark on there the
7 area that you propose to have pasture land?
8 A. How do you want it, striped? I plan to make
9 it all pasture that is not up around the house.
10 Q. Just draw a line, a demarcation line, a
11 Mason-Dixon Line.
12 A. (Witness complies.)
13 Q. Planned pasture, okay. So the amount of water
14 that they have actually put down for your land, is it
15 correct to state it's sufficient for your present
16 irrigation but not for your planned pasture land; is
17 that fair?
18 A. No, that is not correct. They have told me
19 that I can't move the water from one spot to another a
20 the way that the map has been drawn, my lawn is not
21 included in what's being irrigated.
22 Q. So if that restriction were lifted, that would
23 solve at least some of your concern; is that a fair
24 assessment?
25 A. Well, every inch of land I get back would

Page 35

Page 3

1 (Witness writes on Deposition Exhibit No.
2 4.)
3 A. Now, those are the rows of trees and there are
4 also many trees that are scattered. Did you want them
5 all marked?
6 Q. Just the general area. Why don't you just say
7 ST for scattered trees. That will give me an idea of
8 the general area where they are.
9 A. (Witness complies.)
10 Q. Do you have them pretty much located now? I
11 just want an approximation.
12 A. Yes, pretty much.
13 Q. Now, you have, on this one end of the property
14 you have a line that says trees and you have a line
15 where it stops.
16 A. Yes, I haven't got the rest of those planted
17 yet.
18 Q. But it's an area that you intend to plant?
19 A. Yes, I intend to plant all the way around.
20 Q. And you have a large area here (indicating)
21 where there are no trees planted; is that correct?
22 A. There are a few trees out there and this whole
23 side (indicating):
24 Q. Is this an area that you plan to put more
25 trees, is that the idea, or do you not have plans to put

1 solve some of it, yes.
2 Q. Now, along this irrigation ditch that you have
3 marked here (indicating), are there any turnouts; did I
4 understand you correctly that there are no turnouts?
5 A. There are now. There is one right here
6 (indicating) --
7 Q. And you put HG for head gate?
8 A. Yes. And there is one on this side there
9 (indicating), and those are the only head gates that are
10 on there right now that take it off the main ditch.
11 Q. What about back at these two ditches here
12 (indicating)?
13 A. No head gates. I had to put a plastic dam in.
14 Q. When you want water, how do you arrange for
15 its delivery, what's the process you go through?
16 A. They send me out a schedule for the whole
17 subdivision every year and I get the water at like 2:30
18 in the morning, Wednesday mornings, and I go down in the
19 dark to the neighbor up the stream and fumble around
20 until I can find his head gates and take those out and
21 hope that my plastic dams don't wash away.
22 Q. Do you have a contract with the U.S. for this
23 water?
24 A. A contract with the U.S.? Not to my
25 knowledge.

Page 42

Page 42

1 then what I am going to ask you to do is come over here
2 and on our map -- you know, what I think I should do is
3 get another copy of this map out. This is getting
4 pretty cluttered. I will get it marked and then we will
5 simply mark the location of the photographs on it.

6 (Deposition Exhibit No. 6 marked for
7 identification.)

8 Q. Now, can you show me where P1 is located.
9 Just put P1 and put the direction that the picture was
10 taken, where you were standing.

11 A. (Witness complies.)

12 Q. We need to mark the objection P1.

13 A. (Witness complies.)

14 Q. Let's go down to the next one and mark that
15 P2.

16 A. (Witness complies.)

17 Q. Where does P2 show up on this map?

18 A. (Witness indicates.)

19 Q. Now, here I can look at that -- this is the
20 ditch right here (indicating)?

21 A. That's correct.

22 Q. And this (indicating) is that great big
23 building there?

24 A. No, that's one of these (indicating).

25 Q. What's this little building here?

1 Q. So we have got P4 figured out. We need to
2 mark P5 and P6.

3 A. (Witness complies.). This (indicating) is P5
4 and P6 -- I am sorry, that's P5, isn't it.

5 Q. Yes.

6 A. Okay, this one is P6 (indicating).

7 Q. So I should be able to see the ditch in that?

8 A. Yes.

9 Q. This (indicating) is the ditch right here, Mr.
10 Bodily?

11 A. That's correct.

12 Q. Let's mark these pictures P7 and P8.

13 A. (Witness complies.). Okay, P7 (indicating).

14 Q. So now I should be able to see your house.

15 A. That's correct, and this ditch is this one
16 right here (indicating).

17 Q. That obviously is nice pretty grass.

18 A. P8 is this picture and that one is taken from
19 this same spot here (indicating) looking at this corner.

20 Q. Let's go to the next page and we'll mark these
21 P9 and P10.

22 A. (Witness complies.) That's this one and --
23 it's about right here. P9 is down the property line
24 (indicating).

25 Q. So the area to the left with the shrubs is not

Page 43

Page 43

1 A. Two-seated outhouse.

2 Q. Is that on here?

3 A. It's right here with these buildings
4 (indicating).

5 Q. Let's turn the page and we'll mark this P3 and
6 P4.

7 A. That's this one (indicating), P4.

8 Q. What is this one (indicating), then?

9 A. I don't see that one here, at least not that I
10 recognize right now.

11 Q. It's sort of hard to tell from that.

12 A. Yes. I don't see that one here right now.

13 Q. Let's go over to P3.

14 A. That one is not here either.

15 Q. So we have got P4.

16 A. No, it's not here either. That one is a
17 picture of the ditch where it comes into the
18 subdivision.

19 Q. Can you mark where P3 --

20 A. It's right here (indicating). It on this map
21 is right there (indicating).

22 Q. Just put P3 there.

23 A. (Witness complies.)

24 Q. And you are marking Deposition Exhibit No. 3.

25 A. Right.

1 your property; is that correct?

2 A. The shrubs are my property. The property line
3 is on the other side. This is my property line and the
4 property line is on the other side of the trees
5 (indicating), and the ditch is also right behind there.

6 Q. And P10.

7 A. Okay, that one is taken from right here,
8 that's taken from here going that direction and this is
9 the ditch that runs along the driveway right there,
10 that's this ditch (indicating).

11 Q. And that's the driveway right here
12 (indicating).

13 A. That's correct.

14 Q. And is this little place right here
15 (indicating) --

16 A. That's a tree.

17 Q. That's one of your trees, okay. Let me recap
18 to make sure I have got this right. P2 is the one we
19 didn't really figure out; is that correct?

20 A. That's correct.

21 Q. So we don't have it marked on Deposition
22 Exhibit No. 6; is that correct?

23 A. That's correct.

24 Q. So why don't we put down here, just so we get
25 this recorded correctly, omitted from Deposition Exhibit

-#-			26 [1]	2:7		5:7	6:20	11:22	33:12	33:20	35:6
			27 [1]	12:10		13:8	14:16	14:19	35:8	35:18	35:20
#7 [2]	3:6	49:3	27-11560 [3]	1:5		15:19	17:24	18:13	35:24	36:7	40:12
-'-			2:13	20:18		19:20	19:24	21:22	40:14	44:25	
			2:30 [1]	37:17		47:4			areas [4]	7:8	28:6
			-3-			acres [1]		15:16	29:25	32:13	
'81 [2]	29:5	29:11				acres [14]	4:21	9:18	arrange [1]	37:14	
'86 [1]	46:10					13:11	15:11	16:17	aside [1]	23:8	
'88 [1]	46:6		3 [5]	2:5	2:14	17:5	17:14	17:23	Aspen [1]	1:21	
'93 [2]	10:15	11:19	30:12	30:15	43:24	18:1	21:3	24:13	assessed [2]		48:5
-0-			3.9 [1]	14:18		24:14	48:3	48:5	48:10		
			30 [3]	2:14	2:15	action [3]	3:4	49:17	assessment [1]		36:24
01 [1]	16:8		5:22			49:20			association [5]		10:6
01-10248 [1]		1:5	306 [1]	1:13		actual [3]	19:15	41:18	10:9	10:24	11:2
-1-			39576 [1]	1:6		41:22			27:14		
			3:45 [1]	3:2		added [3]	17:23	18:1	associations [1]		27:13
			-4-			20:4			assume [2]	18:23	18:25
1 [8]	2:12	10:2				addition [2]		7:11	athletic [1]	28:7	
10:3	16:7	40:24				11:12			attached [5]		18:10
41:2	41:17	41:25	4 [5]	2:15	31:1	address [5]	3:20	4:5	18:11	19:17	29:6
1,100 [1]	4:24		31:7	31:25	35:2	16:15	17:2	17:6	40:25		
1,500 [2]	7:9	7:16	4.06 [7]	14:20	17:25	Adjudication [1]		30:2	attend [1]	11:6	
1,800 [1]	7:15		18:1	19:23	21:3	administration [2]		28:8	attended [1]		13:15
1/2 [1]	9:18		21:5	21:6		28:10			attending [2]		10:11
10 [3]	2:12	2:13	4.6 [1]	17:23		advertised [1]		8:9	10:16		
46:3			40-acre [1]	17:5		aerial [5]	2:16	12:15	attorney [10]		1:12
102 [1]	1:21		41 [1]	2:16		18:9	18:12	41:2	1:15	1:17	3:7
11-acre [1]	9:19		42 [1]	2:17		again [2]	4:2	15:23	3:23	18:19	19:14
11696 [1]	3:21		48 [1]	2:8		agencies [1]		13:17	22:4	26:5	49:15
12 [1]	21:6		-5-			agree [2]	12:8	14:12	Attorneys [1]		1:21
13 [1]	21:6		5 [4]	1:9	2:16	agreement [2]		18:17	August [3]	8:16	8:19
14 [1]	28:4		41:8	41:10		29:6			27:1		
15 [1]	12:25		5:00 [1]	48:18		ahead [1]	16:12		Austrian [1]		8:2
17 [1]	12:25		5th [1]	3:1		Alan [2]	1:24	11:23	Avenue [1]		3:8
18th [1]	1:18		-6-			alive [1]	7:21		aware [2]	11:2	38:2
19 [1]	12:14		6 [5]	2:17	9:18	allotted [2]		17:18	away [1]	37:21	
1951 [1]	27:3		42:6	45:22	46:1	18:16			-B-		
1980 [7]	6:1	6:2	65 [1]	47:19		almost [1]	8:16		Bannock [5]		1:12
9:13	6:19	7:17	6th [1]	49:22		along [4]	37:2	38:25	3:8	4:7	4:9
1981 [1]	29:3		-7-			40:10	45:9		49:2		
1983 [1]	24:17		7.26 [2]	16:17	48:7	amount [4]	19:20	19:24	Barber [14]	1:14	2:7
1985 [1]	46:10		75 [1]	31:17		19:25	36:13		26:3	26:4	26:9
1987 [2]	24:17	46:6	-9-			animals [1]		36:4	30:6	30:7	30:10
1992 [1]	8:22					announcing [1]		11:24	30:24	41:6	41:18
1993 [6]	10:22	12:1				answers [1]		49:6	46:18	46:22	47:22
12:10	12:14	12:25				anticipated [1]		20:9	barely [1]	4:17	
1995 [3]	1:9	3:2				appear [1]	8:5		barn [1]	23:13	
49:22						APPEARANCES [1]		1:11	basic [1]	28:9	
-2-						appointed [1]		10:19	Basin [1]	30:2	
2 [4]	2:13	10:2				appointment [2]		13:18	become [1]	27:4	
10:3	20:18					13:22			becoming [1]		11:3
20 [1]	5:22		able [3]	12:17	44:7	appreciate [1]		47:23	beef [1]	47:4	
21-10248 [2]		2:12	44:14			approximate [3]		32:1	began [1]	26:22	
16:7			above [2]	49:6	49:11	32:2	32:15		behind [2]	40:11	45:5
22 [1]	2:6		above-entitled [1]		3:4	approximation [1]		35:11	belabor [1]	22:16	
23 [1]	27:1		above-named [1]		3:5	April [4]	1:9	3:1	belonged [1]		17:10
25 [1]	28:14		acceptable [1]		30:5	8:13	49:22		best [2]	26:14	47:13
			acre [6]	5:1	5:23	area [25]	6:9	6:25	better [2]	19:6	41:20
			14:17	20:4	21:6	7:5	8:25	9:17	between [2]		24:17
			24:16			12:16	14:9	25:7	48:8		
			acreage [14]		4:20	25:8	25:15	26:23			
						27:11	27:17	32:14			

40:2	42:14	44:23	expect [2]	38:10	47:15	Fort [15]	1:13	3:7	27:10	27:17	38:18
45:24			expertise [2]		28:19	3:8	10:5	10:23	48:14		
draw [2]	8:24	36:10	28:24			11:18	13:18	14:3	hand [3]	30:14	30:15
drawn [1]	36:20		explained [1]		22:7	14:4	16:22	27:5	49:21		
drive [2]	1:21	6:12	explaining [1]		12:8	27:10	27:17	38:18	handed [1]	30:6	
driveway [10]		7:10				48:14			hard [1]	43:11	
24:1	24:7	24:11	-F-			forth [1]	49:12		hailed [1]	7:4	
24:13	24:15	33:4	fact [2]	12:22	24:22	found [1]	13:14		hay [1]	5:16	
39:23	45:9	45:11	facts [1]	49:5		four [1]	13:11		head [7]	9:5	28:24
drought [1]		8:6	fair [2]	36:17	36:23	friend [1]	25:6		37:7	37:9	37:13
Duane [1]	12:11		Fairbanks [1]		4:13	front [2]	7:6	39:23	37:20	39:7	
dug [2]	7:7	22:18	fall [2]	8:13	8:14	full [1]	49:13		hear [2]	4:2	22:9
duly [2]	3:15	49:9	FALLS [1]	1:3		full-time [1]		28:5	held [1]	14:3	
during [2]	24:18	40:12	familiar [2]		6:11	fumble [1]	37:19		help [1]	26:1	
			27:4						helped [2]	25:21	25:23
-E-			far [5]	19:20	31:17	-G-			helpful [1]	46:18	
E [1]	2:1		40:5	47:19	47:20	Gail [1]	1:23		hereby [1]	49:4	
early [1]	34:1		farm [2]	6:24	40:11	game [1]	39:2		hereto [2]	49:5	49:19
edges [1]	9:6		farming [2]		9:20	garage [5]	24:2	32:14	HG [1]	37:7	
education [1]		28:2	40:11			32:15	32:24	33:5	high [6]	25:15	27:25
either [4]	9:8	22:16	father [2]	12:21	25:12	garbage [1]		7:5	28:2	28:15	28:16
43:14	43:16		feet [4]	4:25	17:4	garden [6]	5:18	5:19	40:21		
elected [1]	10:21		21:6	31:17		5:21	33:21	33:23	higher [1]	40:19	
elementary [1]		28:15	felt [2]	17:9	21:16	34:1			Highland [1]		25:15
eligible [2]	47:17	47:20	fence [2]	39:15	39:16	gate [3]	28:24	37:7	Hill [1]	27:9	
employed [2]		49:16	fences [5]	6:21	7:2	39:7			HKM [3]	11:20	12:6
49:19			7:3	7:4	25:24	gates [4]	9:5	37:9	13:10		
employee [1]		49:18	few [5]	22:5	26:5	37:13	37:20		honeysuckle [1]		8:2
encompasses [1]	4:22		35:22	38:25	40:9	Gaylen [4]	12:21	18:8	hope [1]	37:21	
end [6]	21:4	21:7	fields [1]	9:20		18:12	25:12		hour [1]	3:2	
21:9	35:13	38:8	FIFTH [1]	1:2		Gene [2]	18:8	18:12	house [19]	4:13	4:17
40:6			figure [1]	45:19		general [5]	16:14	22:5	4:22	4:24	7:11
engineer [1]		28:21	figured [1]	44:1		26:5	35:6	35:8	23:2	23:9	24:6
Engineering [1]	2:14		figures [1]	48:9		Generally [1]		8:16	24:9	24:13	24:15
envelope [1]		11:21	filed [4]	16:2	21:16	geography [1]		28:18	27:20	31:25	32:1
errors [1]	31:6		30:1	46:5		given [2]	21:3	49:21	32:3	32:18	36:9
estate [3]	18:17	18:19	filled [2]	7:5	7:7	giving [1]	17:15		44:14	46:16	
29:6			financially [2]		47:20	goes [3]	8:17	39:20	housing [1]		23:22
estimate [1]		24:12	49:20			39:22			huge [1]	7:5	
Eugene [2]	12:21	25:5	first [14]	3:15	8:5	good [3]	14:23	29:8	hundred [1]		24:23
eventually [1]		36:2	8:11	8:12	8:16	41:16			hybrid [1]	8:1	
evidently [2]		29:12	8:18	13:9	13:15	graduated [1]		27:25	hydrologist [1]		28:19
30:20			16:6	16:14	17:16	grain [1]	5:16				
exactly [1]	16:19		26:6	41:2	49:9	grass [4]	7:10	7:12	-I-		
Examination [5]		2:3	five [2]	46:19	47:17	7:13	44:17		Idaho [10]	1:3	1:13
3:17	22:1	26:2	flat [1]	40:19		great [1]	42:22		1:14	1:16	1:22
48:1			flood [3]	5:10	24:5	green [1]	5:13		3:6	3:9	3:22
examined [1]		3:15	24:7			grew [1]	27:8		16:23	49:1	
except [1]	46:14		flow [1]	9:5		ground [2]	22:7	22:14	idea [2]	35:7	35:25
exception [1]		38:24	flows [1]	40:7		grow [1]	47:4		identification [5]		10:4
excused [1]		48:18	Floyd [1]	1:25		growing [1]		20:6	30:13	31:2	41:9
exhibit [21]		10:3	fluttering [1]		19:4	guess [5]	8:17	14:5	42:7		
16:7	20:18	30:11	follow-up [1]		11:23	19:4	21:21	33:17	identified [3]		16:18
30:12	30:15	30:25	following [1]		3:11	-H-			25:3	32:11	
31:1	31:7	31:25	follows [1]		3:16	Hailey [1]	1:22		identify [6]		11:16
35:1	40:23	41:2				half [1]	7:20		12:17	16:19	32:5
41:7	41:8	41:10	food [1]	47:4		Hall [15]	1:13	3:7	33:7	41:3	
41:17	42:6	43:24	foregoing [2]		49:6	3:8	10:5	10:23	immediate [1]		5:3
45:22	45:25		49:12			11:18	13:18	14:3	inch [1]	36:25	
Exhibits [2]		2:10	form [1]	7:7		14:4	16:22	27:5	included [4]		16:10
10:2			forms [1]	10:1					16:12	16:13	36:21
									increase [1]		14:15

Index Page 5

Index Page