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Department of Water Resources

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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	)	SUBCASE NOS. 36-11060, 36-15462
	)	36-00046
Case No. 39576	)	<u>BRIEF IN SUPPORT OF</u>
	)	<u>MOTION FOR SUMMARY</u>
	)	<u>JUDGMENT</u>

DESCRIPTIVE SUMMARY

This document is a brief in support of a motion for summary judgment in the above-referenced Subcase Nos. 36-11060, 36-15462 and 36-00046.

FACTUAL BACKGROUND

Claimant Donnie McFadden/Billingsley Creek Ranch ("BCR") has claimed the three above-numbered water rights in the Snake River Basin Adjudication, the source of which is Three Springs. Water Right No. 36-11060 was claimed for 7.7 cfs for recreation, aesthetics and wildlife. Water Right No. 36-15462 was claimed for 7.7 cfs for fish propagation. Water Right No. 36-00046 was claimed for 5.7 cfs for irrigation use. Two objections were filed, one by the United States of America and the other by John W. Jones, Jr. The United States of America has withdrawn its objection. Jones and BCR

1 have reached a settlement agreement to resolve Jones' objection. If this court grants this
2 motion for summary judgment, the BCR/Jones agreement would recognize BCR's prior
3 right to divert 3.5 cfs of water with a priority date of February 17, 1986, from April 1
4 through September 30, inclusive, and 4.0 cfs with the same priority throughout the
5 remainder of the year. IDWR has recommended a greater quantity with the claimed
6 priority for 36-00046, but a lesser quantity and later priority for 36-11060 and 36-15462.
7

8 This summary judgment is brought to establish proof of the historical diversion of
9 4.0 cfs of water from Three Springs to BCR's property during the non-irrigation season.
10 If this motion is granted by the court, Jones and BCR will voluntarily stipulate to reduce
11 the amount of water BCR is entitled to receive during the irrigation season.
12

13 The Affidavit of George H. Lemmon, Watermaster for District 36A, indicates that
14 approximately two hundred (200) miner's inches or four (4) cfs of water from Three
15 Springs was diverted by BCR's predecessor in interest prior to BCR's acquisition of the
16 property. Although his Affidavit testifies to the fact that such water was delivered during
17 the non-irrigation season, it is apparent that the New International Decree decreed in
18 excess of that amount during the irrigation season. Furthermore, Mr. McFadden's
19 Affidavit clearly shows that from and after the time he acquired the property where the
20 place of use is for each of his water rights, he continued to divert at least 4.0 cfs of water
21 during the irrigation season, as well as 4.0 cfs during the non-irrigation season for various
22 purposes.
23

24 APPLICABLE STANDARDS

25 Summary judgment should be granted if the pleadings and affidavits show there
26 is no genuine issue as to any material fact and that the moving party is entitled to a
27 judgment as a matter of law. I.R.C.P. 56(c). The party moving for summary judgment
28

1 has the initial burden of establishing the absence of a genuine issue of material fact.
2 *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 887 P.2d 1034 (1994). In order to
3 avoid summary judgment, the non-moving party must make a showing sufficient to
4 establish the existence of each element essential to that party's case on which that party
5 will bear the burden of proof at trial." I.R.C.P. 54(c); *Featherston v. Allstate Ins. Co.*,
6 125 Idaho 840, 875 P.2d 937 (1994). "Summary judgment will be granted in a civil action
7 when a litigant opposing the motion fails to make a showing sufficient to establish the
8 existence of an element essential to that party's case on which that party will bear the
9 burden of proof at trial." *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).
10

11 A motion for summary judgment must be granted if the moving party establishes
12 the absence of evidence of an element which the non-moving party will be required to
13 prove at trial
14

15 When a party moving for summary judgment will not carry
16 the burden of production or proof at trial, "genuine issue of
17 material fact" burden may be met by establishing absence of
18 evidence on an element that the nonmoving party will be
19 required to prove at trial. Once such an absence of evidence
20 has been established, the burden then shifts to the party
opposing the motion to establish, via further depositions,
discovery responses or affidavits, that there is indeed a
genuine issue for trial, or to offer a valid justification for the
failure to do so under I.R.C.P. 56(f).

21 *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct. App. 1994) [footnote
22 omitted]. This absence of evidence may be established either by an affirmative showing
23 with the moving party's own evidence or by a review of all the nonmoving party's
24 evidence and the contention that the proof of an element is lacking. *Sanders* at n. 2.
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26
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LAW AND ARGUMENT

Because the Jones have stipulated to the entry of this motion for summary judgment, this summary judgment motion becomes akin to the summary judgment motion filed with regard to Subcase No. 34-02395. It is, in effect, a single party subcase that involves only the claimant of the water right. There is no party opposing this motion. The only dispute is between the Director's Report recommendation and the position advocated by the claimant. IDWR is not a party to this action. The court must, however, determine the correctness of the position advanced by the claimant in this summary judgment.

It is apparent from the Affidavit of George Lemmon that approximately 4.0 cfs has been diverted and delivered to the BCR property during the non-irrigation season for the previous forty (40) years. Portions of that water so diverted were consumptive, and other portions were non-consumptive. When BCR acquired its property, according to the Affidavit of Donnie McFadden, the historic practice of diverting 4.0 cfs from water from Three Springs during the non-irrigation season continued on an annual basis, although his uses of the water became non-consumptive. McFadden constructed ponds on the BCR property, which ponds were utilized for aesthetic, wildlife and recreation purposes. Additionally, the amount of water diverted was utilized for fish propagation purposes. According to the Affidavit of George Lemmon, there has been no period of time during the past forty (40) years in which that 4.0 cfs of water was not diverted by either BCR, or its predecessors in interest, at least insofar as Lemmon is aware.

BCR's predecessors were decreed water rights in the 1932 decree entitled *New International Mortgage Bank v. Idaho Power Company*. That decree provided that the water rights decreed therein were not solely for irrigation purposes, but for "domestic and

1 other purposes." The historical perspective contained in the George Lemmon affidavit
2 shows that 4.0 cfs was diverted during the non-irrigation season, apparently some of which
3 was for stock water purposes. Despite the IDWR's report concerning quantification of
4 stock water uses, Lemmon attested to the fact that the diversion of that amount was
5 necessary to get the water through two miles of a ditch system where drifting snow and
6 cold weather impeded its flow. BCR changed that use when it constructed the ponds and
7 turned the diversion into one that was entirely non-consumptive. Nonetheless, BCR's
8 diversion of the water, like that of its predecessors, was pursuant to the terms of a decree
9 that recognizes purposes other than irrigation and domestic use. The fact that BCR
10 changed its nature of use at a time when there was no regulatory scheme established by
11 the legislature to facilitate such changes, does not obviate or void the appropriateness of
12 BCR's continuing diversion of the 4.0 cfs.
13
14

15 The Director's Reports are "prima facie evidence" of an element of a water right,
16 the corollary of which is a "rebuttable presumption." As discussed in this court's Order
17 Granting Summary Judgment in subcase No. 34-02395, once a presumption is rebutted,
18 it ceases to have any further effect. *Id.* at p. 8. The Affidavits of George Lemmon and
19 Donnie McFadden provide sufficient contrary evidence to the presumption accorded the
20 Director's Report. That being the case, BCR's motion for summary judgment should be
21 granted, allowing the settlement agreement of the parties to become effective. Not only
22 is a summary judgment factually appropriate in this case, it will have the salutary effect
23 of promoting judicial economy in terms of resolving BCR's claims in the SRBA, as well
24 as BCR's Motion to File Objection with regard to the Jones' claim.
25
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27
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1 DATED this 1 day of July, 1996.

2 ROSHOLT, ROBERTSON & TUCKER

3
4 By  _____

5 Gary D. Slette

6
7 **CERTIFICATE OF MAILING**

8 I hereby certify that on the 1 day of July, 1996, I mailed the original and
9 copies of this form, including all attachments, to the following persons by mailing the
original and/or copies, postage prepaid and addressed as follows:

10 1. Original to:

11 Clerk of the District Court
12 Snake River Basin Adjudication
13 253 Third Avenue North
14 P.O. Box 2707
Twin Falls, Idaho 83303-2707

15 2. Copies to (insert names and addresses):

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17 **Hepworth, Lezamiz & Hohnhorst**
18 **133 Shoshone Street North**
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19 **Twin Falls, ID 83303-0389**

20 **A. Lynne Krogh**
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23
24  _____
25 Gary D. Slette
26
27
28