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Department of Water Resources

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UNITED STATES OF AMERICA

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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. 34-12546A, 34-12547A
	)	34-12549A, 34-12554A
	)	34-13347
	)	
	)	MOTION FOR SUMMARY JUDGMENT
Case No. 39576	)	
	)	

DESCRIPTIVE SUMMARY

This is the United States' motion, on behalf of the Bureau of Land Management (BLM), for Summary Judgment in the above-referenced subcases.

MOTION

Claimant, the United States of America, on behalf of the BLM, (hereinafter "United States"), by and through its attorneys, pursuant to Rule 56(c) of the Idaho Rules of Civil

Procedure, hereby moves for entry of a summary judgment and for the Special Master to recommend these claims for decree.¹ As grounds therefor, the United States relies upon the recommendation of the Director, the attached exhibits and the following:

I. Background

A Notice of Claim, based upon state and federal law, was filed for each of the above-referenced subcases, except subcase no. 34-13347 which was claimed under state law only. The director recommended these claims to the United States based on the state law of prior appropriation. See, Exhibit 5. The director "abstracted" the claims based on federal law but made no recommendation. See, Exhibit 6.

Parties filed objections to the director's recommendations and abstracts as listed below:

<u>Claim Number</u>	<u>Objector</u>
34-12546	Gordon Fulton
34-12546A	Margery Fulton-Smith
34-12547	Gordon Fulton
34-12547A	BLM
34-12549	Gordon Fulton
34-12549A	BLM
34-12554	Gordon Fulton
34-12554A	Margery Fulton-Smith

¹ Upon order of the Court, the deadline for filing summary judgment in this case was extended to October 31, 1996, and this motion is timely filed. See, *Order Granting in Part, Motion for Extension of Trial Schedule*, dated September 20, 1996. The United States is filing this motion at this time because trial dates were not extended and the Court must have adequate time to decide the motion prior to the November 14, 1996 trial.

1

II. Argument

² Although Standard Form Fives have been submitted resolving the federal law basis for these claims, the court need not address the sufficiency of these SF5s. "If the state-based half of a 'dual-based' claim is objected to and has an earlier priority date, then the court should determine the state-based claim first." *Case 91-00012, Special Master's Second Amended Recommendation RE: Basin-wide Issue 12*, (August 12, 1996), at 13. In addition, Ms. Fulton-Smith has no right to contest the priority date claimed and recommended for the state-law based claim. *See, Jones v. Jones*, 117 Idaho 621, 624, 790 P.2d 914, 917 (Idaho 1990), ("In general, the consolidation of two cases does not have the effect of merging the two cases into a single action. Rather, 'consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties. . . . ' [citation omitted].")

1. The uncontroverted prima facie evidence of the Director's Report is sufficient for a determination of summary judgment for the United States.

The director recommended "January 1, 1884" as the priority date for the above-referenced subcases. See, Exhibit 5.³ The director's report constitutes prima facie evidence of the nature and extent of the water rights acquired under state law. I.C. 42-1411(4) (1994). Therefore, the United States is entitled to summary judgment as a matter of law where the adverse party fails to overcome the prima facie evidence of the director's report.

Mr. Fulton has not met this burden because he has not presented even a scintilla of evidence that the director's recommendation is incorrect and, therefore, has not shown that there is a genuine issue for trial. Mr. Fulton does not affirmatively dispute any element of the water rights claimed by the United States, with the exception of priority date.⁴ See,

³ The priority date is as recommended in the director's report. The Director's amended recommendation changing the priority date to March 16, 1923 is a legal issue that will be determined in the context of subcase numbers 34-11576, et. al.

⁴ In the United States' requests for admission, Mr. Fulton admits that the correct description of the priority date element is the factual issue in dispute:

Request for Admission No. 1: As to each water right in the above-referenced subcases, admit that the only element of the United States' claims to which you object is priority date.

[Answer:] I admit that this is the main element.

See, Exhibit 8. While Mr. Fulton's answer may appear ambiguous, "[a]n evasive denial of a request for admission, or one that does not specifically deny the matter, or a response that does not set forth in detail the reasons why the answering party can neither admit nor deny

Exhibit 8. And, he has failed to offer any evidence that the United States' priority date is in error. Rather, Mr. Fulton's statements and admissions support the priority date claimed by the United States for these rights of January 1, 1884.

In his admissions, Mr. Fulton admits that the area where these claims are located was settled by 1884 and that cattle accessed these water sources at that time:

Request for Admission No. 4: Admit that individuals, other than native Americans, first settled in the Thousand Springs Crick [sic] drainage area prior to 1884.

[Answer:] They probably did.

Request for Admission No. 5: Admit that individuals, other than native Americans, grazed cattle at or near the water sources claimed in the above-referenced subcases prior to 1884.

[Answer:] They probably did.

Exhibit 8. It is fundamental that "an adverse party may not rest upon the mere allegations or denials of that party's pleadings...." I.R.C.P. 56(e). While Mr. Fulton has alleged that priority date is at issue, he has made no showing that the Director's recommendation is in error. On the contrary, Mr. Fulton's admissions agree that the United States' priority date is correct. Because the objector has failed to present competent

the matter, may be deemed an admission." *Shepard's, Discovery Proceedings in Federal Court*, § 19.05 (3rd ed., 1995). See also, *Asea Inc. v. Southern Pacific Transportation Co.*, 669 F.2d 1242 (9th Cir. 1981). In addition, to the extent that Mr. Fulton's answer to the United States' second request for admission appears to raise a legal question regarding the ownership of this right, the objector establishes that this is not an issue in his answer to interrogatory no. 2, stating that "No, I do not contend that the United States should not be decreed this right." Id.

evidence to the contrary, the presumptive validity of the Director's recommendation is uncontroverted and the United States is entitled to judgment as a matter of law. See, *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991) (verifying that if uncontroverted facts exist which lead to definite disposition as a matter of law, summary judgment is appropriate).

2. The United States' showing that it is entitled to a January 1, 1884 priority date for these claims is supported by ample, uncontroverted evidence.

In addition to the uncontroverted recommendation by the Director, the United States' claim to a priority date is supported by abundant, uncontroverted historical evidence. The claimed priority date of 1884 was determined by extensive review of primary source materials, including; land and survey records, U.S. Census data, and records of the early livestock industry in Idaho. See, Affidavit of James Muhn, Exhibit 1. See also, Exhibits 2, 3 and 4.⁵ Moreover, rather than rely on the date when settlers first appeared in the area, the United States' priority date reflects the date of established livestock use on the public domain. See, Affidavit of James Muhn, Exhibit 1.

Mr. Fulton has failed to refute the United States' claim to a January 1, 1884 priority date. He has submitted no documentation to the United States in response to discovery in support of his contention that the claimed priority date is in

⁵ The documents numbered as Exhibits 2 and 3 submitted in support of this motion are inadvertently referred to as B and C in Mr. Muhn's affidavit.

error.⁶ In addition, as explained *supra*, his admissions show that the priority date is not actually disputed. Therefore, upon the admissions of the objector, pleadings, affidavits submitted herewith, and clear lack of a material fact in genuine dispute, the claimant, United States, is entitled to judgment as a matter of law. I.R.C.P. Rule 56(c).

CONCLUSION

Wherefore, for the foregoing reasons, the United States moves for summary judgment in subcase numbers 34-12546A, 34-12547A, 34-12549A, 34-12554A, and 34-13347 on all elements of the water rights and respectfully requests that the Special Master recommend these water rights pursuant to the November 17, 1992 director's state law recommendation and in accordance with Case 91-00012, *Special Master's Second Amended Recommendation RE: Basin-wide Issue 12*, (August 12, 1996).

⁶ Moreover, while the rebuttable presumption of the director's recommendation may be overcome by a mere scintilla of evidence under a "bursting bubble" theory of presumptions, *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1171 (1986), "when a party moves for summary judgment the opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact." *McCoy v. Lyon*, 765, 769, 820 P.2d 360, 364 (1991). Thus, even if the Court were to find that the United States was not entitled to summary judgment based on the uncontroverted evidence of the director's report, this Court may nonetheless grant summary judgment based on the uncontroverted evidence submitted in support of this motion.

Respectfully submitted, this 27th day of September,
1996.


R. LEE LEININGER
WILLIAM M. FERRY
U.S. Department of Justice
Environment and Natural Resources
Division

CERTIFICATE OF SERVICE

I certify that on the 27th day of September, 1996,
I served a true and correct copy of the United States' Motion for
Summary Judgment upon the following individual by United States
first-class mail, postage prepaid:

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