

Hemenway, Sandy

From: Dana Hofstetter [Dana@IdahoWaterLaw.com]
Sent: Wednesday, April 04, 2012 8:18 PM
To: Hemenway, Sandy
Subject: Colwell - 65-22949 etc. 4001.2
Attachments: SRBA Janicek Decision.pdf

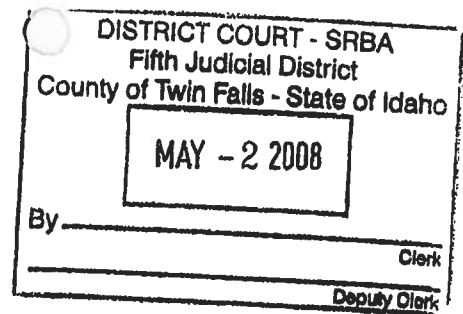
Sandy:

I received your April 2 letter. I will address each of the three items you raise;

1. Thank you for deleting the word "otherwise." It seemed to add only ambiguity and for this reason, I thought it best to delete it.
2. I attach the SRBA Janicek decision from which the waste water language in condition 2 of 65-22948 originates (please refer especially to the waste water language on pages 11 and 15 of that document). As you will note, the original language refers to "place" not "place of use" and therefore it appeared to me that the words "of use" had been inadvertently added at some point. I believe the language is intended to refer to place of wasting water, not the place of use.
3. I will contact George Colwell and arrange for submission of the \$400 fee.

Thank you,
Dana

4-6-12 Shelley said that Dana's changes do not change the meaning of the conditions & we can accept these changes & move forward. g.H.



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)
)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

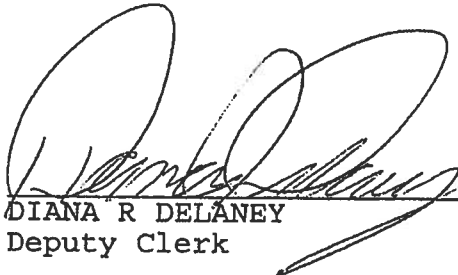
Water Right(s): 63-27475

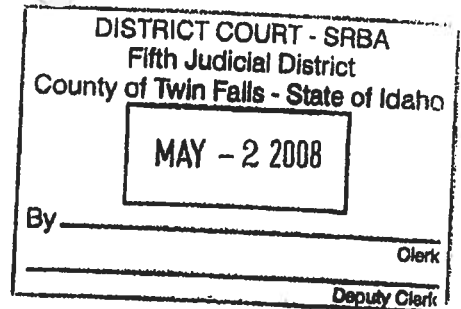
On May 02, 2008, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED May 02, 2008.


DIANA R DELANEY
Deputy Clerk



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

CERTIFICATE OF MAILING

Water Right(s): 63-27475

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on May 02, 2008, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

JANICEK PROPERTIES LLC
Represented by:
MICHAEL P LAWRENCE
PO BOX 2720
BOISE, ID 83701
Phone: 208-388-1200

NAMPA AND MERIDIAN
Represented by:
S. BRYCE FARRIS
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

CERTIFICATE OF MAILING

PAGE 1
05/02/08

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT was mailed on May 02, 2008, with sufficient first-class postage to the following:

JANICEK PROPERTIES LLC

Represented by:

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PIONEER IRRIGATION DISTRICT

Represented by:

SCOTT L CAMPBELL

101 S CAPITOL BLVD 10TH FLOOR

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USDI BUREAU OF RECLAMATION

Represented by:

US DEPARTMENT OF JUSTICE

ENVIRONMENT & NATL' RESOURCES

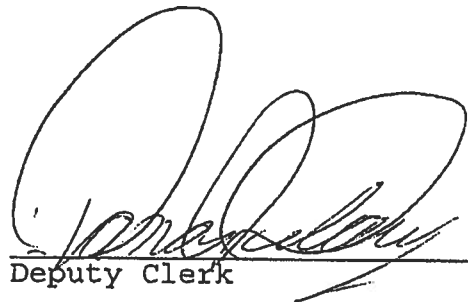
550 WEST FORT STREET, MSC 033

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DIRECTOR OF IDWR

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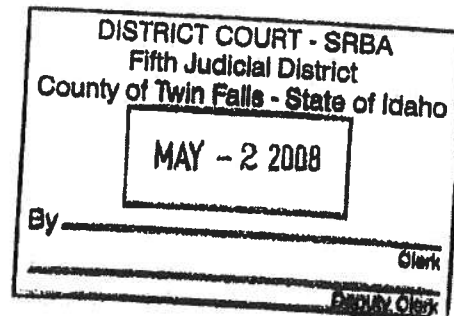
BOISE, ID 83720-0098



RECEIVED

MAY 05 2008

Givens Pursley, LLP



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 63-27475
) (Janicek Properties, LLC)
)
) MEMORANDUM DECISION AND
) ORDER ON MOTION FOR SUMMARY
) JUDGMENT
)
) SPECIAL MASTER'S REPORT AND
) RECOMMENDATION

Summary of Ruling: The water in Purdam Gulch Creek, which includes seepage and waste water from the Nampa & Meridian Irrigation District, is public water of the state and therefore subject to appropriation and beneficial use in accordance with Idaho law, regardless of whether the creek is a natural stream or watercourse. The partial decree for Janicek's water right should include a remark regarding the use of wastewater. Janicek's water right was not initiated in trespass. The license agreement entered into by the NMID and Bradley Janicek in 1996 for the use of water from the Sky Pilot drain does not estop Janicek from asserting a claim to a water right from Purdam Gulch Creek.

I. APPEARANCES

Michael C. Creamer and Michael P. Lawrence, Givens Pursley, LLP, Boise, Idaho, for claimant Janicek Properties, LLC.

S. Bryce Farris, Ringert Clark Chartered, Boise, Idaho, for objector Nampa & Meridian Irrigation District.

David W. Gehlert, United States Department of Justice, Denver, Colorado, for respondent United States of America, Department of Interior, Bureau of Reclamation.

Scott L. Campbell, Dylan B. Lawrence, Moffat, Thomas, Barrett, Rock & Fields, Chartered, Boise, Idaho, for intervenor Pioneer Irrigation District.

II. STATEMENT OF FACTS

The water right claim at issue herein is based upon beneficial use. The right is claimed by Janicek Properties, LLC ("Janicek"), and was recommended in the Basin 63, Part 2, *Director's Report* with the following elements:

Source: Purdam Gulch Creek
Quantity: 1.400 cfs
Priority Date: 03/01/1951
Point of Diversion: T03N R01W S15 SESENE
Purpose and Period of Use: Irrigation 03/01 to 11/15
Place of Use: T03N R01W S15 SWNE (34.00 acres) SENE (36.00 acres) 70 acres total

The source of the claimed right has been referred to in the briefing as Purdam Gulch, Purdam Slough, Purdam Slough Drain, Purdam Drain, and Purdam Gulch Creek. The name of source is not at issue herein, and accordingly the name used in the *Director's Report* – Purdam Gulch Creek -- will hereinafter be used.

On June 1, 1915, the United States of America, Department of Interior, Bureau of Reclamation ("BOR") and the Nampa & Meridian Irrigation District ("NMID") entered into a contract ("1915 Contract") designed to meet two goals: 1) secure additional water supply for the NMID, particularly storage water from the Boise Project, which included Arrowrock and Deer Flat reservoirs; and 2) to construct a system of drains to remove canal seepage and irrigation infiltration water that had been raising the water table and making or threatening to make some lands within the NMID incapable of cultivation. 1915 Contract, pp. 1-2, Exhibit C to the *Affidavit of Michael P. Lawrence*. The 1915 Contract contemplated that the drains to be constructed would have sufficient capacity to drain seepage water that originated both in the lands lying above the NMID, as well as seepage water originating within the NMID itself. *Id.*, pp. 3-4. The 1915 Contract contemplated the construction of only "principal" drains, to which individual and community farm drains could be connected. *Id.*, p 4.

The parties to the contract (the BOR and the NMID) agreed, as between themselves, to an apportionment of the right to water developed in the drainage system.

Id., p. 7. The 1915 Contract also contemplated that some funds may need to be used as compensation for damages for interference with existing rights with sources of water in the "drains, sloughs or natural channels" within the NMID, where the deepening of such channels and the construction of the drains may interfere with such rights. *Id.*, pp. 16-17. The "Estimate of Cost" attached to the 1915 Contract states: "The proposed [drainage] ditches will follow the natural drainage courses as closely as feasible, and these channels will be straightened and deepened. Five Mile Creek, Wilson Slough, Purdam Gulch, Elijah Slough." *Id.*, Estimate of Cost at p. 1.

The 70 acre place of use for Janicek's claimed right is wholly within the boundaries of the NMID. *Affidavit of John P. Anderson*, p. 2. Janicek's property receives NMID water delivered through the Kennedy Lateral. *Id.* Janicek's property also receives drainage benefits by the NMID. *Id.* Janicek's property is near the top of the Purdam Gulch Creek drain, which begins less than one mile to the east. *Id.* Janicek is the owner of the land through which Purdam Gulch Creek passes and upon which Janicek's claimed point of diversion is located. *Affidavit of Bradley J. Janicek; Affidavit of Jerry Gregg*, Exhibit G (Map of Boise Project). Janicek is the record owner, in fee simple, of the real property that includes the bed and banks of Purdam Gulch Creek where said Creek crosses his property. *Affidavit of Bradley J. Janicek*. There are no instruments of record which describe the NMID's real property interests in the bed and banks of Purdam Gulch Creek where it crosses Janicek's property. *Id.*

The Purdam Gulch Creek drain, along the relevant stretch, is constructed to a depth of approximately twelve feet (12'). *Affidavit of Robert D. Schmidt*. Essentially all of the water that collects in the Purdam Gulch Creek drain is water from canal seepage and irrigation infiltration occurring within NMID lands. *Id.* The vast majority of the water in the Purdam Gulch Creek drain results from the interception of shallow ground water, and direct surface runoff may contribute water at some times of the year, depending on precipitation conditions. *Affidavit of Scott N. King*, p. 3.

By 1914, after several years of widespread irrigation both outside and within the boundaries of the NMID, and prior to the construction of the drain in Purdam Gulch Creek, the water table in the vicinity of Purdam Gulch Creek had risen to between zero

feet (0') and six feet (6'). *Affidavit of Jerry Gregg, Exhibit E.* In the absence of this irrigation, the water table would have been much lower. *Affidavit of Robert D. Schmidt.* The computer model of subsurface flow utilized by Robert Schmidt predicts that the pre-development water table would have been 13.6 feet below the bottom of the drain (which was constructed to a depth of approximately 12 feet). *Affidavit of Robert D. Schmidt.* In the absence of the shallow ground water that contributes to the Purdam Gulch Creek drain, it is unlikely that pre-development surface runoff into Purdam Gulch Creek would have yielded sufficient water in either volume or continuity of flow to be beneficially useable for the irrigation of farm land.

The NMID recaptures and re-uses water from the Purdam Gulch Creek drain downstream from Janicek's point of diversion. The NMID pumps water from the drain to the Kennedy Lateral to be used by NMID landowners. Additionally, water in the drain is diverted into a pressurized irrigation system for the St. James Place Subdivision. *Affidavit of John P. Anderson.* Neither the NMID nor the BOR have alleged that the NMID recaptures and re-uses all of its water that finds its way into the Purdam Gulch Creek drain, nor are there any facts in the record showing that Janicek's diversion has caused the flow of water in the drain to be insufficient for NMID's purposes of re-use. Upon leaving the boundaries of the NMID, the water in the Purdam Gulch Creek drain enters the boundaries of the Pioneer Irrigation District.

Neither the NMID nor the BOR have ever communicated to Janicek that his diversion works or his use of the water from the drain have caused injury to the drainage ditch, interfered with the functioning of the system, or hindered NMID's maintenance of the drain. *Affidavit of Bradley J. Janicek.*

III. ISSUES PRESENTED

The *Motion for Summary Judgment* filed by Janicek and the opposition thereto filed by the NMID and the BOR raise the following issues:

1. Was the water in Purdam Gulch Creek -- which is a drain constructed by the Bureau of Reclamation ("BOR") pursuant to a contract between the BOR and the

Nampa & Meridian Irrigation District ("NMID") dated June 1, 1915 – subject to appropriation on March 1, 1951?] ✓

2. Should the partial decree issued for Janicek's water right contain a remark for purposes of defining, clarifying, or administering the right?] ✓

3. Was Janicek's claimed water right initiated in trespass and therefore invalid?

4. Is Janicek estopped to assert a water right from the Purdam Gulch Creek drain by reason that one of the members of Janicek Properties, LLC (Bradley Janicek) had previously entered into a license agreement with the NMID for the use of water out of the Sky Pilot drain?

IV. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on April 16, 2008. The parties have not requested an opportunity to submit additional briefing, nor does this Special Master require any additional briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or April 17, 2008.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be

drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

VI. ANALYSIS

1. Was the water in the Purdam Gulch Creek drain subject to appropriation on March 1, 1951?

For the reasons set forth below, this Special Master holds that on the date of appropriation and beneficial use of the water of the Purdam Gulch Creek drain by Janicek's predecessor-in-interest (March 1, 1951), the water therein was public water of the state of Idaho and subject to appropriation and beneficial use.

The NMID and the BOR argue that the Purdam Gulch Creek drain is not a natural stream or watercourse¹, and therefore the water therein is not subject to appropriation. Janicek argues that the Purdam Gulch Creek drain is a natural watercourse, but further argues that irrespective of whether the drain is, or is not, a natural watercourse, Janicek's appropriation of water is valid because waste, seepage, and spring waters are subject to appropriation under Idaho Code § 42-107, which states:

42-107. Priority – Waste, seepage, and spring waters. – All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams.

¹ The Idaho Supreme Court has defined a natural water course as:

[A] stream of water flowing in a definite channel, having a bed or sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Burgess v. Salmon River Canal Co., 119 Idaho 299, 305, 805 P.2d 1223, 1229 (2001); *Loosli v. Heseman*, 66 Idaho 469, 481, 162 P.2d 393, 398 (1945).

This Special Master agrees with Janicek and holds that a determination of whether the Purdam Gulch Creek drain is, or at sometime was, a natural watercourse is immaterial, and that the water in the drain is public water of the state and therefor was subject to being appropriated by Janicek's predecessor-in-interest.²

The argument put forth by the NMID and the BOR relies upon a the statement contained in the last sentence of *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927):

Where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation under [I.C. § 42-107].

Sebern, 44 Idaho at 418, 258 P. at 178. Janicek argues that this statement is *dictum*, and was not necessary for the determination made in that case. Janicek also points out that this statement has not since been cited by any Idaho court. For the reasons set forth below, this Special Master finds that this statement in *Sebern* is not inconsistent with the holding herein that Janicek has a valid water right with a source of the Purdam Gulch drain.

The statement in *Sebern* is in regard to appropriations of waste or seepage water pursuant to Idaho Code § 42-107. In reading Idaho Code § 42-107, it should be noted that the statute applies to "*utilizing seepage, waste or spring water of the state . . .*" Two key observations to be made are: 1) the statute envisions "*utilizing*" the water (i.e. beneficial use), as opposed to drainage of water for the purpose of elimination; and 2) the water is "*water of the state*" as opposed to private water.³ The statement made by the *Sebern* court presupposes that the person who constructed a ditch to collect seepage and waste water did so with the intent of beneficially using all of the water so collected. The

² There is considerable uncertainty in making a factual determination – either from the affidavits on file, or at trial on the matter – as to the hydraulic properties of Purdam Gulch Creek prior to human manipulation of the flow of water in the area. Whatever those hydraulic properties may have been, they have not existed for many years, and did not exist in 1951 at the time of appropriation of the subject right. Large scale irrigation had raised the water table in the Purdam Gulch and elsewhere, and a deep drain was excavated by the BOR for the purpose of lowering the water table. Janicek's predecessors-in-interest made the appropriation of water under the conditions as they essentially exist today, not under the conditions that existed prior to the excavation of the drain.

³ The common law doctrine relating to private water has been recognized in Idaho, and the definition is codified in I.C. §§ 42-212 and 213. It is not contended by any party in this subcase that the water in the Purdam Gulch Creek drain is private water.

statement simply does not address the situation where the person or entity that constructed the drainage ditch does not beneficially use all of the water so collected, leaving a balance of *water of the state* in the ditch. Any water collected in the drain but not appropriated for beneficial use by the person or entity that constructed the drain, remains water of the state, and as such it is subject to appropriation in accordance with Idaho law. For this reason, the determination of whether the Purdam Gulch Creek drainage structure is a natural stream or not is immaterial – what matters is that the water is water of the state.

The NMID argues that there is no difference between Janicek drawing water from the Purdam Gulch Creek drain and drawing water directly out of NMID's delivery canals. This Special Master is not persuaded by this argument because there is a clear distinction between the two.

The NMID's diversions from the running streams of the state are required to have some type of infrastructure at the point of diversion that is designed to regulate and control the amount of water diverted. In this way, the amount of water diverted is in line with the amount entitled to be diverted under the applicable water right(s), and the conveyance system can be turned off at the end of the applicable period of use. A ditch constructed for the purpose of intercepting and collecting seepage or waste water from saturated soils, on the other hand, does not and can not have any such infrastructure. Such a ditch does not even have a precise point of diversion. The ditch will collect whatever water drains into it, and there simply is no way to regulate, limit, or shut off the flow of water into the drainage ditch. Because of this inability to regulate and limit the flow of water into the ditch, it is certainly possible that the amount of public water collected in the drain exceeds that which can be beneficially used by the person or entity that constructed the ditch – in terms of quantity, annual volume, and period of use. Because any balance of unused water in the drainage ditch is still public water of the state, it is subject to appropriation under the laws of the state.

The "*dictum*" sentence from *Sebern* is not necessarily an incorrect statement of the law, but rather it is incomplete. A more complete statement is: Idaho Code § 42-107 provides that public waters of the state that are found in the form of seepage, waste,

or spring waters, may be collected by means of ditches and appropriated under the same laws relating to priority as the waters of running streams. Because the extent of such an appropriation is determined by the extent of beneficial use, in the event that the appropriator is unable to beneficially use all of the water so collected, any balance remaining in the ditch is subject to appropriation by other users in accordance with Idaho law. Where such appropriator is able to beneficially use all of the water so collected, and “where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to [subsequent] appropriation under [I.C. § 42-107].” *Sebern*, 44 Idaho at 418, 258 P. at 178.

Under this rule, it would not matter whether the right to the use of the water by the constructor of the ditch was based upon the beneficial use of the water so collected in the drain (as is contemplated by I.C. § 42-107), or whether the right to the use of the drain water is based upon the right of a paramount appropriator to recapture and reuse identifiable water previously diverted from a natural stream (as is the right of the NMID in the instant case). The alternative interpretation of the statement in *Sebern* essentially creates a license for the continued wasting of water by placing a servitude on the water which prevents it from being used by others until it comeslingles with a natural stream, i.e. the original appropriator is not using the water and others are precluded as well from using the water.

2. Should the partial decree issued for Janicek’s water right contain a remark for purposes of defining, clarifying, or administering the right?

At oral argument on summary judgment, the parties discussed whether a remark should be included in Janicek’s water right - should such right exist – regarding the legal effect of the water right having a source that includes waste water. Counsel for Janicek argued that no such remark would be necessary. Counsel for the NMID argued that any right of Janicek to use the waste water of the NMID should be qualified by a remark.

Under Idaho Code § 42-1411(2)(j), the director of IDWR may include in a director’s report “such remarks and other matters as are necessary for definition of the

right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(j). The *Director's Report* for water right 63-27475 contains no remark regarding the fact that a substantial portion of the water in Purdam Gulch Creek drain is waste water and seepage coming from lands irrigated by water diverted from the Boise River under NMID's water rights. Under Idaho law, the NMID has the right to recapture and re-use any of this water that can reasonably be identified as originating from water diverted under its water rights. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980)(citing *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945)); *United States v. Haga*, 276 F. 41 (D. Idaho 1921). This right to recapture and re-use is unaffected by junior appropriations of the waste and seepage water. *Hidden Springs*, 101 Idaho at 680, 619 P.2d at 1133. The water so re-used by NMID is pursuant to the right(s) under which the water was first diverted, and not as an independent water right to the use of the seepage and drain water. *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78. Such re-use by NMID would necessarily have to occur within the parameters of the right under which the water was diverted – importantly within the allowable place of use. The NMID is the paramount appropriator of the water that can be so identified, and as such the right of the NMID to capture and re-use this water is superior to Janicek's right in two respects.

First, the NMID's right is superior based on relative priority dates. Janicek's right has a priority date of 1951, the NMID rights are much earlier. *NMID's Memorandum in Opposition*, p. 3. Accordingly, any re-use of the water in the drain that is identifiably NMID water would be a use under those earlier priority dates. Secondly, and irrespective of the relative priority dates, NMID is the paramount appropriator and has the right to cease wasting the water, in good faith change the place or manner of wasting it, or to recapture it, so long as the NMID applies it to beneficial use within the parameters of the water right(s) under which it was diverted. *Sebern*, 44 Idaho at 418, 258 P. at 178 (citing *United States v. Haga*, 276 F. 41). Janicek does not have a vested right to such seepage and waste water as against the NMID's paramount ownership.

In accordance with the foregoing, and despite the fact that no waste water remark was included in the *Director's Report*, for purposes of the administration of both Janicek's right and the NMID's paramount right(s), this Special Master finds and concludes that the partial decree issued for Janicek's water right should contain the following remark:

The source of this water right includes waste water. This right remains subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

This Special Master finds the remark is necessary to define Janicek's right to show that the right is not subject to the same panoply of rights associated with a water right with a source that does not include waste water. Furthermore, such a remark prevents any injury resulting to the paramount appropriator.

3. Was Janicek's claimed water right initiated in trespass and therefore invalid?

The NMID argues that the Purdam Gulch Creek drain is a "facility owned, operated, and maintained by NMID," and that Janicek's diversion of water constitutes a trespass upon that NMID owned facility. *NMID's Memorandum in Opposition*, p. 6. Under Idaho law, one cannot initiate a water right in trespass. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941); *Jones v. McIntire*, 60 Idaho 338, 344, 91 P.2d 373 (1939). As explained below, this Special Master holds that Janicek's water right was not initiated in trespass

The affidavits on file in this subcase demonstrate that Janicek is the owner of record, in fee simple, of the real property where his point of diversion is located. *Affidavit of Bradley Janicek*, pp. 1-2. Furthermore, Janicek's diversion works in the Purdam Gulch Creek drain have not interfered with NMID's or BOR use of the drain. *Id.* p.2. The NMID describes the Purdam Gulch Creek drain as a "facility" of the NMID. *NMID's Memorandum in Opposition*, p. 2. There is no question that this facility – the Purdam Gulch Creek drain – is an inseparable component or fixture of the real property

upon which it lies. The nature and extent of NMID's property interest for this facility in Janicek's real property is not clearly described. It may be that the NMID has an easement by prescription over Janicek's property, or perhaps if the land had not been patented into private ownership prior to the construction of the ditch, the 1866 ditch rights-of-way act might be applicable. 43 U.S.C. § 661 (1866). As pointed out in Janicek's *Reply Memorandum*, neither the NMID nor the BOR have produced any recorded instruments showing a real property interest of the NMID or BOR in Janicek's real property. Suffice it to say that whatever the precise nature of the NMID to use Janicek's property, such interest allows use, not possession.

The traditional common-law elements for a cause of action in trespass are: 1) an invasion; 2) which interferes with the right of exclusive possession of the land; and 3) which is a direct result of some act committed by the defendant. *Mock v. Pollatch Corp.*, 786 F. Supp. 1545, 1548 (D. Idaho 1992). Further, the common-law requirement for trespass *quare clausum fregit* is that it must be against a possessory interest in real property. As such, an action for trespass does not lie against a property interest in the form of an easement, which is an incorporeal hereditament and not possessory.⁴ *Socony-Vacuum Oil Co. v. Bailey*, 202 Misc. 364, 365, 109 N.Y.S.2d 799, 801 1952 (citing Pollock's Law of Torts, 14th ed. 1939, p. 299; Tiffany, Law of Real Property, 3rd ed. 1939, Vol. 3, § 814; (Cf. *First Baptist Church v. Witherell*, 1832, 3 Paige 296 and *Shaw v. Beveridge*, 1842, 3 Hill 26 (in which trespass was held to lie for interference with right of owner of church pew on theory such right was not an easement but a property right and therefore 'real estate'))).

Whatever the nature of the NMID's interest in Janicek's property along the location of the Purdam Gulch Creek drain, such an interest is not for the exclusive possession of the real estate, rather it is Janicek who is entitled to such exclusive possession. Accordingly, the assertion that Janicek or his predecessors-in-interest have trespassed upon property owned by the NMID is without merit. Janicek's water right was not initiated, and has not been maintained in trespass.

4. Is Janicek estopped to assert a water right from the Purdam Gulch Creek drain?

The NMID asserts that Janicek is estopped to assert the subject water right because Janicek knows that it must get NMID permission to pump from a drain facility operated by the NMID. The factual underpinning of this argument is a license agreement entered into between Bradley Janicek and the NMID in 1996 that allowed Bradley Janicek to temporarily pump from the Sky Pilot drain. This Special Master finds this argument to be unpersuasive, and holds that Janicek is not so estopped.

As pointed out by Janicek in its *Reply Memorandum*, the factual relationship between Janicek's claim to a water right from the Purdam Gulch Creek drain and the temporary use of NMID water by Bradley Janicek's is insufficient to estop Janicek, and the agreement entered into by Bradley Janicek cannot be construed as an admission by Janicek Properties, LLC as to any issues in this subcase. One obvious distinction is that in 1951, a water right could be appropriated through diversion and beneficial use. In 1996, however, had Bradley Janicek sought a water right from the Sky Pilot drain, he would have needed to file an application for permit to appropriate the water. It is unlikely that Mr. Janicek would go to such measures if all he needed was a temporary use of water. Janicek's use of the water of the Purdam Gulch Creek drain, on the other hand, was not pursuant to a license agreement, and because the such use involved the application to beneficial use of public water of the state, prior to change in law in 1971 to a mandatory permit requirement, Janicek's water right was perfected upon such application to beneficial use. Accordingly, Janicek is not estopped to claim the right in the SRBA.

VII. ORDER AND RECOMMENDATION

In accordance with the foregoing, the *Motion for Summary Judgment* filed by Janicek Properties LLC is **granted**. Therefore, IT IS RECOMMENDED that water right

⁴ It should also be noted that a water right, which is a usufructory right and not possessory, is also an incorporeal hereditament, and as such a common law action for trespass will not lie for interference with a

63-27475 be decreed with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated May 2, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

water right.

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

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAY - 2 2008

By _____ Clerk
Deputy Clerk

In Re SRBA)
Case No. 39576)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 63-27475

NAME AND ADDRESS: JANICEK PROPERTIES LLC
1284 S GOSLING WAY
EAGLE, ID 83616

SOURCE: PURDAM GULCH CREEK TRIBUTARY: MASON CREEK

QUANTITY: 1.40 CFS

PRIORITY DATE: 03/01/1951

POINT OF DIVERSION: T03N R01W S15 SESENE Within Ada County

PURPOSE AND			
PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-01 TO 11-15	1.40 CFS

PLACE OF USE:	Irrigation		Within Ada County
	T03N R01W S15	SWNE 34.0	SENE 36.0
	70.0 Acres Total		

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The source of this water right includes waste water. The right remains subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION

MAY - 2 2008

John M. Melanson
SPECIAL MASTER