

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

SWALLEY IRRIGATION DISTRICT,  
Plaintiff,

Civ. No. 04-1721-AA  
OPINION AND ORDER

v.

GARY CLEMENT ALVIS, et al.,  
Defendants.

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AIKEN, Judge:

Plaintiff and defendants Alvis, DeJarnatt, Robbins, and Ross filed cross-motions for summary judgment regarding plaintiff's claim for a declaratory judgment allowing it to convert an irrigation canal into an irrigation pipeline over property located in Section Sixteen, Township Seventeen, South of Range Twelve East of the Willamette Meridian (Section Sixteen lands). Plaintiff also moves for reconsideration of the court's previous ruling regarding the scope of its irrigation easement across non-Section Sixteen lands. Finally, plaintiff moves for an order allowing it to utilize existing financing to begin conversion of the irrigation canal over non-Section Sixteen Lands.

#### BACKGROUND

Plaintiff is an irrigation district organized in 1994 for the purpose of delivering water from the Deschutes River to its members and is the successor in interest to the Deschutes Reclamation and Irrigation Company (DRIC). Pursuant to an irrigation right of way, plaintiff maintains an irrigation canal that is approximately

thirteen miles long and delivers water to lands owned by plaintiff's members according to adjudicated water rights. Plaintiff seeks to convert 5.1 miles of the canal to a buried pipeline, with the conversion and pipeline not to exceed plaintiff's claimed 100-foot wide irrigation right of way.

On November 24, 2004, plaintiff filed suit seeking a declaratory judgment that an irrigation right of way secured by DRIC under the federal Act of March 3, 1891 encompasses the irrigation pipeline project. Plaintiff also sought a declaration that the conversion of the canal to a buried pipeline will not unlawfully burden defendants' servient property interests and that defendants remain subject to the rights and privileges possessed by plaintiff. Plaintiff sought court intervention after several property owners claimed that the pipeline conversion project unlawfully expanded the scope of plaintiff's easement and threatened to file suit to challenge the project.

On January 25, 2005, plaintiff filed an Amended Complaint, dropping some named defendants and adding others. Plaintiff has effectuated service of the Amended Complaint on all named defendants.<sup>1</sup> The named defendants in this action - numbering over one hundred and sixty - are property owners who own land adjacent

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<sup>1</sup>The lone exception is Chet Antonsen, who was added as a defendant upon motion of plaintiff on May 1, 2005. However, Antonsen is not named as a defendant in plaintiff's most recent pleading, and I consider Antonsen dropped from this lawsuit.

to plaintiff's irrigation canal. Of those, defendants Alvis, Christen, DeJarnatt, Rice, Robbins, Ross, Scarth, and Vernon have appeared through counsel. Defendants Bennett, Brassfield, Delanys, Kierulff, Perry, Rapp, and Shimp have appeared *pro se*. The remaining defendants have not filed an answer or otherwise appeared in this action.

On September 26, 2005, defendants Alvis, DeJarnatt, Robbins, and Ross (hereinafter referred to as "defendants") moved for summary judgment on plaintiff's claims, and on November 21, 2005, plaintiff filed a cross-motion for partial summary judgment.

On March 1, 2006, I issued an Opinion and Order granting plaintiff's motion for partial summary judgment, in part. Specifically, I agreed that the irrigation right of way secured by DRIC under the Act of March 3, 1891 encompasses the conversion of the irrigation canal to a buried pipeline over lands owned by the United States in 1891, and that plaintiff is entitled to a declaratory judgment that it may construct an irrigation pipeline over such lands. Further, I found that plaintiff is entitled to a declaratory judgment that conversion of the canal to a buried pipeline will not unlawfully burden the servient property rights of defendants who own such lands, provided that the pipeline project does not extend below the bottom of the existing canal or beyond fifty feet from each side of the canal. See Act of March 3, 1891, *as amended*, 43 U.S.C. § 946.

However, I also found that plaintiff could not rely on the Act of March 3, 1891 to support the pipeline conversion over lands within Section Sixteen, because such lands were acquired by the State of Oregon in 1859. As plaintiff alleged no other basis for its claims, I allowed plaintiff leave to amend its complaint and plead facts supporting the pipeline conversion over lands acquired by the State of Oregon in 1859 and to which the Act of March 3, 1891 does not apply.

On March 31, 2006, plaintiff filed a Second Amended Complaint, alleging that it had secured an irrigation right of way within Section Sixteen lands pursuant to Oregon law, and that conversion of the canal to an underground irrigation pipeline is embraced by plaintiff's secured right of way. Plaintiff served the Second Amended Complaint on defendants Alvis, DeJarnatt, Robbins, Ross, Bennett, Delany, Perry, Rapp, and Shimp.

On June 25, 2006, plaintiff filed a second motion for partial summary judgment regarding its authority to pursue the pipeline conversion over Section Sixteen lands. As part of its motion, plaintiff requests that the court reconsider its ruling that the depth of the easement secured under the Act of March 3, 1891 is limited to the floor of the existing irrigation canal. On July 10, 2006, defendants filed a cross-motion for summary judgment and opposition to plaintiff's motions.

On August 15, 2006, I ordered plaintiff to submit copies of

the Oregon laws on which it relies to establish an easement over Section Sixteen lands and also ordered the parties to submit official plat maps of the defendants' properties by September 15, 2006.

On September 5, 2006, defendants submitted (but did not file) plat maps of their properties. On September 18, 2006 plaintiff responded to the court's order and filed copies of the Oregon Laws on which it relies in support of its motion along with an affidavit and additional references to caselaw. On September 21, 2006, defendants moved to strike the latter portion of plaintiff's response to the court's order.

On October 5, 2006, plaintiff filed a motion to expedite or accelerate seeking permission to begin the first installment of the pipeline conversion over non-Section Sixteen lands by November 15, 2006. Finally, on November 10, 2006, defendants moved to strike plaintiff's reply supporting its motion to expedite or accelerate.

#### DISCUSSION

##### A. Section Sixteen Lands

Originally, plaintiff argued that the irrigation easement secured by DRIC under the federal Act of March 3, 1891 grants plaintiff the authority to convert the irrigation canal into an underground pipeline with respect to all of the named defendants' properties. However, plaintiff has since conceded that lands in Section Sixteen - including lands now owned by defendants Alvis and

Ross - were acquired by the State of Oregon in 1859, and that the Act of March 3, 1891 did not secure an irrigation right of way over these lands. See Opinion and Order dated March 1, 2006, p. 12. In addition to Alvis and Ross, *pro se* defendants Bennett, Delany, Kierulff, Perry, Rapp, and Shimp have alleged that their properties lie within Section Sixteen.<sup>2</sup> Plaintiff has not contested their assertions, and I accept them as true. Therefore, plaintiff's concession applies to the properties of *pro se* defendants Bennett, Delany, Kierulff, Perry, Rapp and Shimp.

Nonetheless, plaintiff maintains that it possesses a similar irrigation easement through Section Sixteen lands - extending fifty feet from either the midline or the banks of the existing irrigation canal - pursuant to Oregon law. Specifically, plaintiff relies on the Oregon Act of February 18, 1891, the Oregon Act of February 18, 1899, and the Oregon Act of February 22, 1905. Alternatively, plaintiff argues that it has acquired such rights through adverse possession and the law of prescriptive easements.

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<sup>2</sup>Although represented by counsel, defendants Christen, Rice, and Vernon did not respond to plaintiff's original motion for partial summary judgment. In response to plaintiff's second motion, defendants Christen adopt the arguments raised by defendants Alvis, DeJarnatt, Robbins and Ross. However, defendants Christen do not allege or provide evidence to show that their property lies within Section Sixteen. See doc. 234. Further, in their Answer to the Amended Complaint, defendants Christen assert abandonment and two counterclaims for declaratory judgment and just compensation. See doc. 200. However, defendants Christen provide no argument or evidence to support their claims for abandonment and just compensation.

I agree with defendants that none of the Oregon laws support the relief that plaintiff seeks. More specifically, unlike the federal Act of March 3, 1891, these Oregon acts do not create or convey an irrigation right of way by operation of law.<sup>3</sup>

For example, the Act of February 18, 1891 authorizes an irrigation district to "condemn lands and premises necessary for right of way for its ditch or canal or flume" after the irrigation district has acquired the right to appropriate water, so long as the right of way does "not exceed one hundred feet in width." Act of February 18, 1891 for the Appropriation of Water, §§ 2, 6. With respect to public lands, the Act of February 18, 1891 grants irrigation rights of way across "any and all lands belonging to the State of Oregon." Id. § 25. Thus, the Act of February 18, 1891 merely authorizes condemnation of private lands for irrigations rights of way; it does not in and of itself create enforceable easement rights over private lands absent condemnation proceedings.

Here, defendants have presented evidence that in 1902 a private party obtained a land patent from the State of Oregon for

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<sup>3</sup>To the extent plaintiff relies on the expert report of Gail L. Achterman (attached as Ex. A to doc. 237), I do not find the report to be of "appreciable help" under Federal Rule of Evidence 702, as it contains factual findings and legal conclusions that are more appropriately determined by the court. See Little Oil Co., Inc. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988). Additionally, the report fails to include evidence that the expert is qualified to render such opinions; although the expert states that a resume is attached to the expert report, it is not.

lands within Section Sixteen (including property owned by defendants Alvis and Ross), and plaintiff presents no evidence that it obtained water appropriation rights or an irrigation right of way over Section Sixteen lands before such lands were transferred to private ownership in 1902. See Declaration of William Sherlock in Support of Cross-Motion for Summary Judgment (attachment to doc. 235) (hereinafter "Sherlock Decl."), Ex. 2. In fact, plaintiff concedes that it possesses no documentary evidence to show that any of plaintiff's predecessors secured an irrigation right of way over Section Sixteen lands. Absent evidence that plaintiff's predecessor in interest actually obtained, through condemnation, a 100-foot irrigation right of way, plaintiff cannot rely on the Act of February 18, 1891 to support its claim with respect to Section Sixteen lands.<sup>4</sup>

Similarly, the Act of February 18, 1899 authorizes appropriation of water for the purposes of developing mineral resources and electrical power, as well as condemnation of private lands for water rights of way not to exceed fifty feet in width. Act of February 18, 1899 for the Appropriation of Water, §§ 1, 7. However, this act does not grant or convey easements over private

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<sup>4</sup>Even if plaintiff could establish that it acquired an irrigation right of way under the Act of February 18, 1891, plaintiff has no evidence that it acquired an easement extending fifty-feet from each side of the canal; the Act authorizes rights of way "not to exceed" 100 feet - it does not convey such an easement. Act of February 18, 1891, § 6.

lands for the delivery of water. Therefore, the Act of February 18, 1899 does not establish that plaintiff's predecessor secured a 100-foot irrigation easement over Section Sixteen lands.

Finally, plaintiff relies on the Act of February 22, 1905, 1905 Or. Laws chap. 228, which provides for the appropriation of water for the reclamation of arid lands. 1905 Or. Laws, chap. 228, § 1. Plaintiff relies specifically on § 12, which grants "over all the unimproved lands *now or hereafter belonging to the State* the necessary right of way for ditches, canals, and reservoir sites for irrigation purposes constructed by authority of the United States or otherwise." Id. § 12 (emphasis added). Defendants argue that § 12 is inapplicable here, because plaintiff presents no evidence that its predecessor constructed the irrigation canal across Section Sixteen lands pursuant to the authority of the United States. Moreover, § 12 explicitly grants rights of way over lands belonging to the State of Oregon, and plaintiff does not dispute that defendants' properties within Section Sixteen were privately owned prior to 1905. Therefore, plaintiff cannot rely on the Act of February 22, 1905 to support its claimed irrigation right of way over Section Sixteen lands.

In support of their cross-motion for summary judgment, defendants argue that plaintiff's lack of documentary evidence to support creation of its irrigation right of way compels the conclusion that plaintiff possesses no irrigation right of way

across Section Sixteen lands. However, defendants concede that plat maps and title reports of various properties reflect irrigation rights of way over Section Sixteen lands, and defendants do not dispute that plaintiff's irrigation canal was and is used for the delivery of irrigation water.

In the construction of easements, the fundamental principle is to discern the purposes of the grant and to give effect to them in a practical manner. When the language of the instrument is clear, that language, and only that language, decides the easement's limits. However, when the grant is indefinite, the location of the easement may be shown by the first location and use of the easement, or it may be subsequently fixed by an implied agreement arising out of the use of a particular way for a long time by the benefitted party and acquiescence in that use on the part of the burdened party.

Tipperman v. Tsiatsos, 140 Or. App. 282, 286, 915 P.2d 446 (1996) (citations omitted), aff'd in part and modified on other grounds, 327 Or. 539, 964 P.2d 1015 (1998).

Indeed, defendant Alvis submitted a title report and plat map reflecting a twenty-foot right of way over property adjacent to plaintiff's irrigation canal within the Thompson Estates subdivision. Likewise, defendants Ross submitted a title report and plat map reflecting a fifty-foot irrigation right of way adjacent to plaintiff's irrigation canal. See Sherlock Decl., Exs. 5 and 6; plat maps submitted by defendants on September 5, 2006. No explanation for this disparity is offered. Regardless, defendants Alvis and Ross accepted title of their properties subject to plaintiff's irrigation right of way. Accordingly, I

find that defendants now cannot challenge the existence of plaintiff's irrigation easement, even though plaintiff fails to show how and under what authority the easement was secured. At the same time, however, plaintiff's representatives approved the plat maps, and I find that plaintiff is likewise bound by the irrigation easements as reflected on the plat maps.

Throughout these proceedings, several *pro se* defendants also have submitted copies of plat maps, though reduced in size, to support their claims that plaintiff's right of way is limited to an easement of twenty feet within the Brookside First Addition and Shallowbrook subdivisions. As with the Township Estates subdivision plat map, a representative of plaintiff's predecessor approved the Brookside First Addition and Shallowbrook plat maps, which reflect a twenty-foot irrigation right of way over property adjacent to the irrigation canal. See docs. 14 and 226 and letter of Stewart C. Bennett. Additionally, *pro se* plaintiff Lawrence P. Kierulff avers that plaintiff's easement is limited to forty feet in width with respect to his property located within the Boyd Acres View Estates subdivision, as noted on a plat map dated February 17, 1999. See doc. 195. However, Mr. Kierulff failed to provide a copy of the plat map for this subdivision, and I will not make such a finding absent a copy of the plat map.

Accordingly, I find that plaintiff possesses an irrigation easement extending twenty feet from the sides of the irrigation

canal over adjacent lands within the Township Estates, Brookside First Addition and Shallowbrook subdivisions, as reflected on the plat maps submitted to the court. With respect to the property owned by defendants Ross, plaintiff possesses an irrigation easement extending fifty feet from the side of the irrigation canal, as noted on their plat map.

As they argued in response to plaintiff's first motion for summary judgment, defendants maintain that even if plaintiff possesses a right of way for its irrigation canal, conversion of the canal to a pipeline is not encompassed within that right. Again, I disagree. "An easement owner is limited to those uses of the easement that are reasonably necessary for the easement's intended purpose." Tooker v. Feinstein, 131 Or. App. 684, 687, 886 P.2d 1051 (1994), on recon. 133 Or. App. 107, 889 P.2d 1356, rev. den., 321 Or. 94, 893 P.2d 540 (1995). Ordinarily, however, a "'grantee [of an easement] is not restricted to the methods of use which were current at the time of the grant,'" but reasonably may change that use over time as long as the burden on the servient estate is not increased." Kell v. Oppenlander, 154 Or. App. 422, 427, 961 P.2d 861 (1998) (citing Bernards et. ux. v. Link and Haynes, 199 Or. 579, 593-97, 248 P.2d 341, on reh'g 199 Or. 605, 263 P.2d 794 (1953)). Thus, to restrict an easement grantee's use, express language must clearly impose a use limitation or extrinsic evidence must show that the parties intended such a limitation.

Id. at 428 (citing Jones v. Edwards, 219 Or. 429, 433-35, 347 P.2d 846 (1959)). "Where the language is equivocal and there is no evidence or only scant evidence of what the parties intended, as is true here, the Supreme Court gives an easement its ordinary scope, permitting the use reasonably to change with changing needs." Id.; see also Kondor v. Prose, 50 Or. App. 55, 61, 622 P.2d 741 (1981) ("The dominant estate owner may make a different, more intensive use of the easement, provided such use does not substantially increase the burden on the servient estate."); Restatement (Third) of Property: (Servitudes) § 4.10 (2000).

In Bernards, the Oregon Supreme Court held that "a right of way for a railroad" for the purpose of delivering logs permitted the subsequent construction of logging roads within the right of way. 199 Or. at 582, 604, 248 P.2d 341. The Court explained:

Although the owner of a right of way over land of another is limited in his use of the right to the terms of the grant, yet it is settled that the grantee may avail himself of modern improvements which will enable him to enjoy more fully the rights which were granted. In other words, in determining the meaning of the grant, *it will be inferred, in the absence of express language to the contrary, that the grantee is not restricted to the methods of use which were current at the time of the grant.*

Id. at 597, 248 P.2d 341 (emphasis added). Thus, the Court found that the easement "permitted the grantee, as long as it used the easement, to keep abreast of the developments of the times, and accordingly, [we] conclude that when it became more economical to convert from a railroad to a logging road, the grantee was at

liberty to do so." Id. at 604, 248 P.2d 341.

I have already found that conversion of plaintiff's irrigation canal to an irrigation pipeline is within the purpose for which the easement was created, so long as the conversion does not increase the burden on the servient property. Opinion and Order dated March 1, 2006, pp. 8-9. Defendants do not argue that the purpose of the easement - a right of way for the delivery of irrigation water - will be altered by conversion to an irrigation pipeline. Thus, the only change is the means by which that purpose is effectuated, and I find that such a change in method, if within the parameters of plaintiff's right of way, does not increase the burden on defendants' servient property.

Here, defendants would have the court construe "burden" to mean any detriment or loss of incidental benefit resulting from the conversion, including the loss of aesthetic quality, which in turn could result in decreasing property values. However, defendants do not and cannot argue that they benefit directly from the delivery of irrigation water, or that they possess rights in such water; thus, the benefit defendants derive from plaintiff's right of way is incidental. See Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148, 151-52 (Utah 1946) (cutting off seepage from irrigation ditch that supplied water for trees and plants on servient property does not constitute "adding an additional burden to the servient estate but is merely taking away an incidentally accrued benefit"),

criticized on other grounds, *Harvey v. Hights Bench Irr. Co.*, 318 P.2d 343 (Utah 1957). Therefore, so long as the pipeline is constructed within plaintiff's existing easement, I find that it will not increase the burden on defendants' servient properties.

I do not find persuasive plaintiff's reliance on *Clark v. Kuhn*, 171 Or. App. 29, 15 P.3d 37 (2000). There, the Oregon Court of Appeals found that paving a gravel road and installing a gate within an easement were not reasonably necessary to accomplish the purpose of easement - to provide ingress and egress - particularly when the improvements would require the removal of numerous trees on the servient property. *Id.* at 34-35, 15 P.3d 37. Defendants argue that installation of a pipeline likewise is not necessary for the delivery of irrigation water. However, a private right of way for ingress and egress is dissimilar to a right of way for the delivery of irrigation water to users within an irrigation district. "Placement of irrigation ditches in underground pipes or addition of gates, collars and safety screens, is common and necessary in modern irrigation practices . . . ." *Abbott v. Nampa School District*, 808 P.2d 1289, 1296 (Idaho 1991); see also *Papa v. Flake*, 503 P.2d 972, 974 (Ariz. App. 1972) (lining an irrigation ditch with concrete did not constitute an unreasonable change to the irrigation easement).

Moreover, under Oregon law, the use of water for irrigation purposes and the right of way secured for such purpose "is declared

to be a public use more necessary and more beneficial than any other use, either public or private, to which the water, water rights, rights to appropriate water, lands or other property have been or may be appropriated within the district." Or. Rev. Stat. § 545.249; see also id. § 543.650 (state policy authorizing and promoting the development of hydroelectric power capabilities of water systems serving irrigation purposes).

For all of these reasons, I find that the conversion of plaintiff's irrigation canal to an underground pipeline is permitted within the scope of plaintiff's right of way. To the extent that the pipeline conversion requires more than a twenty-foot easement on each side of the irrigation canal, plaintiff may expand its right of way upon commencement of condemnation proceedings and payment of just compensation as authorized under Oregon statutes. See Or. Rev. Stat. §§ 772.305, 772.310.

#### B. Motion for Reconsideration

Plaintiff moves the court to reconsider its ruling that the depth of its easement under the federal Act of March 3, 1981 extend only "to the ground occupied by the water" of the irrigation canal. Plaintiff explains that it wishes to excavate below the canal bed to reduce the visual impact of the berm that will cover the underground pipeline. Further, plaintiff represents that all but two property owners outside of Section Sixteen who live adjacent to the 1.7 mile stretch of irrigation canal targeted for the first

installation of pipeline have no objection to the excavation.

It may well be that excavation would be more efficient and attractive than placing the pipeline on the bed of the canal and covering it with a large earthen berm. Regardless, the Act of March 3, 1891 imposes specific limits that a right of way granted under the Act extend only "to the ground occupied by the water . . . of any canals and laterals and fifty feet on each side." 43 U.S.C. § 946. Plaintiff provides no authority that the court may enlarge the irrigation easement beyond that prescribed by statute. Accordingly, plaintiff's motion for reconsideration is denied.

#### C. Motion to Expedite or Accelerate

Finally, plaintiff moves the court for an order allowing it to begin construction on the first phase of pipeline project over non-Section Sixteen lands. Plaintiff claims that if the pipeline conversion project does not commence by November 15, 2006, it may lose \$1.5 billion in grant money that it has been awarded. The loss of grant money, if it is indeed lost, is an unfortunate occurrence, but one that is unavoidable given the current state of the record and the lack of evidence to support final judgment.

Presumably, plaintiff relies on the court's Opinion and Order dated March 1, 2006, that plaintiff's easement secured by the Act of March 3, 1891 permits plaintiff to convert its canal to underground pipeline over non-Section Sixteen lands. However, although plaintiff has served all defendants with its first Amended

Complaint (that relies on the Act of March 3, 1891), plaintiff has not sought partial judgment against any defendant who owns property to which the federal Act of March 3, 1891 and the court's Opinion and Order of March 1, 2006 apply. Notably, plaintiff has not sought default judgment under Federal Rule of Civil Procedure 55 against any of the numerous defendants who have not appeared. Likewise, plaintiff has not sought judgment under Federal Rule of Civil Procedure 54(b) against defendants who have appeared - either *pro se* or through counsel - who are likewise subject to the court's March 1, 2006 Opinion and Order.

Absent entry of judgment based on evidence that establishes which defendants are subject to the court's March 1, 2006 Opinion and Order, I cannot authorize conversion of plaintiff's irrigation canal over non-Section Sixteen lands pursuant to plaintiff's easement secured under the federal Act of March 3, 1891. Accordingly, before final judgment may issue, plaintiff must provide evidence that establishes ownership of specific parcels of property with respect to each defendant who owns property subject to plaintiff's irrigation right of way secured under the Act of March 3, 1891, except for defendants DeJarnatt and Robbins.

Although plaintiff's motion is limited to the pipeline conversion over non-Section Sixteen lands, I note that the existing record also precludes final judgment against those defendants who own property within Section Sixteen. Plaintiff served its Second

Amended Complaint (relying on state law) on defendants Alvis, DeJarnatt, Robbins, Ross, Bennett, Delany, Perry, Rapp, and Shimp only, even though other defendants presumably own property within Section Sixteen. In fact, when plaintiff moved to file its Second Amended Complaint, plaintiff's counsel represented that defendants did not oppose the motion, provided that plaintiff initiated service of process for all defendants who have not appeared and who are subject to plaintiff's state law claim, i.e., who own property within Section Sixteen. See doc. 229. Until service is effectuated or plaintiff establishes that no other defendant own Section Sixteen land, plaintiff cannot seek final judgment.

Once service is effectuated, plaintiff shall provide documentary evidence, such as deeds of trust or title reports, that establish ownership of specific parcels of property with respect to each defendant who owns property within Section Sixteen, except for defendants Alvis, Bennett, Delany, Perry, Rapp, Ross, and Shimp. Plaintiff may then seek final judgment pursuant to Federal Rules of Civil Procedure 54 and 55 as to all claims against all defendants.

#### CONCLUSION

Plaintiff's Motion for Summary Judgment and Motion for Reconsideration (doc. 232) are GRANTED, in part, and defendants' Motion for Summary Judgment (doc. 235) is DENIED. Within the Brookside First Addition, Shallowbrook, and Thompson Estates subdivisions, plaintiff possesses an irrigation right of way over

