

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

RECEIVED

JAN 11 2008

DEPARTMENT OF
WATER RESOURCES

In Re SRBA)

A. Subcase: 37-00497B

Case No. 39576)

STANDARD FORM 2
RESPONSE TO OBJECTION

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON RESPONDING

Name: Flying Heart Ranch II Subdivision Owners Association

Address: P.O. Box 2163

Hailey, ID 83333

Daytime Phone: (208) 481-0403

Name & Address of Attorney, if any:

Fritz X. Haemmerle

HAEMMERLE & HAEMMERLE, P.L.L.C.

P.O. Box 1800

Hailey, ID 83333

**C. NAME AND ADDRESS OF PERSON WHO FILED THE OBJECTION TO
WHICH YOU ARE RESPONDING**

Name: Tom O'Gara

John F. Stevenson

Bill Molyneux

Pete Van Der Meulen

Grace Eakin

Rocky Sherbine

Gerald Bashaw

Pepin Corso-Harris

c/o Concerned Water Users

P.O. Box 1200

Bellevue, ID 83313

Big Wood Canal Company

112 South Apple Street

Shoshone, ID 83352

Address: Albert P. Barker
BARKER, ROSHOLT & SIMPSON, LLP
P.O. Box 2139
Boise, ID 83701
Tel: (208) 336-0700
For O'Gara, Stevenson, Molyneux,
Van Der Meulen, Eakin
Sherbine & Bashaw

Craig Hobdey
HOBDEY & HOBDEY
P.O. Box 176
Gooding, ID 83330
Tel: (208) 934-4420
For: Big Wood Canal Company

D. I am responding to the objections to the following elements. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
2. ☐ **Source**
3. ☐ **Quantity**
4. ☒ **Priority Date**
5. ☐ **Point(s) of Diversion**
6. ☐ **Instream Flow Description**
7. ☒ **Purpose(s) of Use**
8. ☐ **Period of Year**
9. ☐ **Place of Use**
11. ☐ **Recommendation**

☒ This water right should not exist. (This water right should exist).

☐ This water right was not recommended, but should be recommended with the elements described above.

Reasons for Response:

1. **Failure to Properly Serve:** The Big Wood Canal Company did not verify their objection as required by law, so its objection should be dismissed. The "Concerned Water Users" failed to sign the objection in its name, so its objection should be dismissed. Also, the Objectors failed to serve both owners of the water right.
2. **Lack of Standing:** The so-called "Concerned Water Users" are not claimants in the SRBA, so its objection should be dismissed. Upon information and belief, the claimant also maintains the Objectors are unaffected and are not injured in fact by the claims.

3. **Res Judicata, Collateral Estoppel, Judicial Estoppel, Administrative Estoppel, Waiver and Estoppel:** “Aesthetic, wildlife and recreation” uses have been decreed in the SRBA court, without objection of the Objectors in this case, so they are foreclosed through all claim preclusion theories, including, but not limited to, res judicata, collateral estoppel, judicial estoppel, administrative estoppel and estoppel and from asserting these issues; or in the alternative, the Objectors have waived their right to object on this basis or they are estopped from raising such objections including but not limited to by their failure to object to the licensing, transfer and adjudication of this and other rights.
4. **Failure to State a Claim:** The Objectors relied on Idaho Code Section 42-1501. Section 42-1501 addresses only minimum stream flows and, therefore, is not applicable to whether or not the claimed uses for this right exists. The Objectors further argue that a right water right cannot be appropriated unless the Idaho legislature or Constitution” declares sue to be beneficial. Contrary to the Objectors’ argument, there is nothing in the state constitution or statutes that limit or define the term “beneficial use.” The Objectors’ argument is in direct contravention of the Idaho Supreme Court’s holding in *State, Department of Parks v. Idaho Department of Water Resources*, 96 Idaho 440, 530 P.2d 924 (1974), wherein the Court held that “[w]hile it is well established in western water law that an application of water must be made for a ‘beneficial use,’ nevertheless in Idaho at least the generic term ‘beneficial use’ has never been judicially or statutorily defined.” To the extent that the Objectors assert that a beneficial use must be defined by the legislature or constitution, the argument lacks a basis in law or fact and, therefore, is subject to sanctions under I.R.C.P. Rule 11(a)(1). Nevertheless, the Idaho Department of Water Resources (“IDWR”) has allowed “aesthetic, wildlife and recreation uses” and their agency determination is entitled to great deference. For this and other reasons, the Objectors have failed to state a claim.
5. **Attorney’s Fees and Costs:** The claimant is entitled to costs and attorney fees under Idaho law, including but not limited to under Idaho Rules of Civil Procedure 54 and Idaho Code Sections 12-121 and 12-123.

E.

VERIFICATION (Must be Completed)

State of Idaho)
)ss.
County of Blaine)

Fritz X. Haemmerle, duly sworn, upon oath, deposes and says:

That I am the party/claimant filing this response as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding and that I have read this response, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing response)

(Fritz X. Haemmerle)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: (Lacie Thompson) _____

Notary Public for _____

Residing at: _____

My Commission Expires: _____

F.

CERTIFICATE OF MAILING

I certify that on Dec. 9th, 2007, I mailed the original and copies of this response, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

Elise G. Lufkin	cc: James P. Speck
505 Starweather Dr.	SPECK & AANESTAD, PA
Hailey, ID 83333	P.O. Box 987
	Ketchum, ID 83340

3. One copy to the party who filed the objection at the following address:

Concerned Water Users
P.O. Box 1200
Bellevue, ID 83313

Albert P. Barker
BARKER, ROSHOLT & SIMPSON, LLP
P.O. Box 2139
Boise, ID 83701
Tel: (208) 336-0700
For O'Gara, Stevenson, Molyneux,
Van Der Meulen, Eakin
Sherbine & Bashaw

Craig Hobdey
HOBDEY & HOBDEY
P.O. Box 176
Gooding, ID 83330
Tel: (208) 934-4420
For: Big Wood Canal Company

4. Copies to:

IDWR Document Depository United States Department of Justice
PO Box 83720 Environment & Natural Resource Division
Boise, ID 83720-0098 550 West Fort Street, MSC 033

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449
Boise, ID 83724



Fritz X. Haemmerle