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Attorneys for The Valley Club, Inc.

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

In Re SRBA

Case No. 39576

Subcase Nos. 37-00494, 37-00495, 37-
 00577BU, 37-00577BV, 37-00657B, 37-
 00833K, 37-02623

**REPLY TO BIG WOOD CANAL
 COMPANY'S RESPONSE TO
 MOTION TO DISMISS
 OBJECTIONS AND REQUEST FOR
 ATTORNEY FEES**

The Valley Club, Inc ("TVC"), through its attorneys Givens Pursley LLP, hereby replies to Big Wood Canal Company's ("BWCC") Response ("Response") to TVC's Motion to Dismiss Objections and Request for Attorney Fees.

I. INTRODUCTION

In its Response, BWCC contends that it is not collaterally attacking an Idaho Department of Water Resources' ("IDWR") administrative determination in the SRBA when it objects to recommended elements of TVC's claimed water rights that were finally determined in a prior contested case proceeding to which BWCC was a party.

And BWCC alleges, without supporting affidavit, that it had an “understanding”—apparently with IDWR—that TVC’s water rights would be amended in the transfer to include certain conditions. BWCC argues that since such conditions were not imposed by IDWR in its transfer approval in 1991, BWCC is allowed to ask the SRBA Court now, nearly 17 years later, to reopen and decide issues (i.e., the validity of the aesthetic and recreational uses and the authorized diversion rates) that BWCC had a full and fair opportunity to protest and litigate before IDWR and the courts, pursuant to the Administrative Procedures Act, Idaho Code §§ 67-5200, *et seq.* (“APA”). BWCC fails to even acknowledge the exhaustion of remedies requirement of the APA, let alone the substantial and consistent decisions *of this Court*, that bar its objections.

BWCC also has offered the Court unsupported and incorrect facts. The facts properly in evidence in these subcases indicate that, to the extent BWCC desired an understanding with IDWR or TVC, the understanding was that BWCC would withdraw its protest “providing the conditions to[sic] flowmeter and measuring device [outlined by EHM Engineering] are made a condition of the transfer.” *See* Exhibit F to Creamer Affidavit previously filed with the Court. IDWR did not include this condition in its final order. If BWCC felt this “understanding” with IDWR somehow had been breached, its remedy was provided (and required to be pursued) by the APA.

BWCC could not have felt that any understanding it had with TVC concerning a flowmeter or measuring or control device had been breached because, as the Affidavit of Gerald Martens demonstrates, these devices *were* installed.

BWCC waived its right and opportunity to object to the IDWR decision on TVC's transfer where the now-recommended aesthetic and recreational uses and diversion rates were concluded. To the extent that Transfer 3742 concluded that TVC's predecessor-in-interest was authorized to divert the subject water rights for aesthetic and recreational purposes and for irrigation in the amounts and places described in the transfer approval, BWCC now is bound by those conclusions with respect to those water rights.

To the extent that BWCC now challenges the validity of aesthetic, recreational and/or wildlife purposes of use *as a matter of law* in subcases involving water rights that were not included in Transfer 3742, BWCC also must be bound by IDWR's conclusions authorizing such uses in Transfer 3742. If BWCC prevailed on this purely legal issue, the result would negate all aesthetic and recreational purposes of use, including those authorized by Transfer 3742.

II. STATEMENT OF FACTS

A brief statement of facts established by affidavit is necessary to correct the unsupported statements that BWCC has made in its Response concerning the events surrounding water transfers T-3742 (transferring surface water rights 37-00577, 37-00494, 37-00495, and 37-00833K) , T-3743 (transferring ground water right 37-02623), and T-71721 (transferring surface water right 37-657B).

Gerald Martens is a certified professional engineer who was hired by Wood River Country Club Partners ("Partners"), TVC's predecessor-in-interest, to assist it in obtaining transfers T-3742 and T-3743. *See* Affidavit of Gerald Martens, P.E., L.S. ("Martens Affidavit") at ¶ 1 and ¶ 3,

Mr. Martens states that on August 21, 1990 he met with Mr. Oneida, the manager of the BWCC, to discuss BWCC's protest. *Id.* at ¶ 7. Mr. Martens summarized their discussion in his letter dated August 22, 1990. *Id.* at ¶ 7. (Mr. Martens's letter is attached as Exhibit F to Creamer Affidavit.)

The following spring, on April 22, 1991, Mr. Martens met with the Hiawatha Canal Manager and the District 37 Watermaster to discuss the implementation of the items in Mr. Martens's August 22, 1990 letter concerning the flowmeter, totalizing meter and lockable flow rate adjustment device. *Id.* at ¶ 8.

On approximately October 21, 1991, Mr. Martens provided the plans for the flowmeter, totalizing meter, and the flow rate adjustment device to Mr. Oneida, pursuant to paragraph 1c of Mr. Martens's August 22, 1990 letter. *Id.* These devices were, in fact, installed, although they never were made conditions of Transfer T-3742. *Id.*

Although alleged in BWCC's Response, there are no actual facts evidencing that BWCC and Partners discussed any amendment or condition affecting the place of use, point of diversion, or nature of use of any of the above-captioned water rights as suggested by BWCC's Response. *Id.* at ¶ 6. Not surprisingly, since these issues never were discussed, no agreement could have been reached between Partners and BWCC concerning these matters. *Id.*

III. ARGUMENT

- A. BWCC is barred from collaterally attacking the aesthetic and recreational purposes of use and recommended diversion rates recognized in transfer T-3742 because it was a party to that proceeding.

The SRBA Court repeatedly has held that parties may not collaterally attack licenses issued by the IDWR. *See e.g., Memorandum Decision and Order on Challenge; Order on*

State's Motion to Dismiss Claimant's Notice of Challenge, Subcase No. 36-08099, 4 SRBA 2, 2.13 (2000) (IDWR license becomes final when the time to appeal it has expired); *see also*, *Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman*, 5 SRBA 4, 4.10 (2001) (failure to appeal a license when issued is a collateral attack); *Response to United States Motion for Status Conference*, Subcase No. 03-10022, 4 SRBA 16, 16.15 (2000) (scope of what can be litigated in SRBA is limited and does not include collateral attacks on previously perfected water rights); *Memorandum Decisions and Order on Challenge, Order on State of Idaho's Motion to Dismiss Claimants Notice of Challenge*, Subcase No. 36-08099, 4 SRBA 2 (2000) (collateral attack on IDWR license is not permissible when a party has failed to exhaust administrative remedies).

The doctrine of collateral attack applied by this Court states that, "if a license is not appealed when issued, attempts to appeal the license in subsequent legal proceedings, such as the SRBA, would constitute a collateral attack."¹ *Order Recommending Partial Decree Be Set Aside*, Subcase Nos. 31-7311, 31-2357 and 31-2395, 8 SRBA 17, 17.3 (2004). BWCC admits that it was a party to transfer T-3742 which involved water rights 37-577B, 37-00494, 37-00495, and 37-0833K. Response to Motion to Dismiss, ¶ 3. If BWCC felt itself aggrieved by IDWR's authorization of the aesthetic and recreational purposes of use or the diversion rates or conditions that were imposed or not imposed, BWCC clearly had the opportunity (and obligation) to appeal the transfer decision when it was issued. BWCC offers no explanation why it did not. Since it did not appeal the transfer decision when it was issued, its current attempt to litigate the validity

¹ TVC already has discussed in its opening brief why the bar to collateral attacks applies to attacks on IDWR-approved transfers as well as licenses. *See* TVC's Memorandum in Support of Motion to Dismiss Objections and Request for Attorney Fees at page 14.

of the recommended elements or conditions constitutes an impermissible collateral attack under the decisions of this Court. 8 SRBA 17, 17.3 (2004). A party to an IDWR administrative determination may not collaterally attack that determination in the SRBA. *Id.*²

- B. BWCC may not challenge water rights conveyed in transfers T-3743 and T- 71721 because it had the opportunity to become a party to those administrative transfer proceedings.

The SRBA also has held that nonparties to a licensing proceeding may not collaterally attack IDWR determinations if they had the opportunity to protest the IDWR determination but did not do so. In 1997, the SRBA issued a decision concerning a water right recommended by IDWR for the Ruby Springs Water Company. Ruby Springs obtained the subject water right through a transfer of a licensed water right in 1976, and IDWR's recommendation of the right to the SRBA was challenged by the Adamses. The Adamses were not parties to the IDWR licensing or transfer proceedings. In denying the Adamses' objection this Court held:

The Special Master entered lengthy findings about [the Ruby Springs license] and its several transfers leading up to its issuance to Ruby Springs Water Co. The Adamses' had the *opportunity to protest the License transfer at the time of issuance which they failed to do*. They waived any challenge to the issuance of the License. The SRBA is not a [Court] authorized to revive lost challenges to licensing decisions.

Order Adopting Special Master's Report and Recommendation, Subcase No. 36-07092A, December 10, 1997 (emphasis added). *See also, Response to United States Motion for Status Conference*, Subcase No. 03-10022, March 23, 2000 (holding that Nez Perce Tribe was barred from challenging a licensed water right, where the tribe had not filed any objections to the water

² The bar to collateral attacks also should guide this Court in reviewing BWCC's Motion to Amend Objections. By that motion, BWCC seeks to amend its objections to include a lengthy list of water right conditions and remarks that it now would like to litigate, including conditions that were imposed, and others that were not imposed, in transfers T-3742, T-3743 and T-71721 and recommended by IDWR to the Court in the instant subcases.

rights and the period for objecting had expired).

BWCC had notice and an opportunity to protest transfers T-3743 and T-71721, which involved certain of the water rights that are the subject of these subcases. Notice of these transfers was published in the local Wood River Journal, which is the same place transfer T-3742 was published (i.e., the transfer BWCC did protest). BWCC failed to do so. Upon issuance of a transfer decision, any *person*, whether they were a protestant or not, that feels himself aggrieved may request a hearing. Idaho Code § 42-222(5); Idaho Code § 42-1701A(3). This too, BWCC failed to do. BWCC had several opportunities to become a party to transfers T-3742 and T-71721 and did not. BWCC is barred from challenging the conclusions now.

C. Partners did not deceive Mr. Oneida.

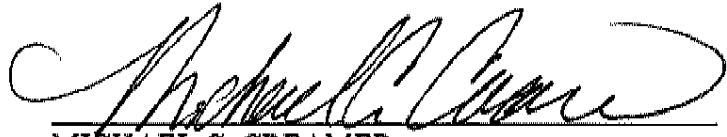
BWCC asserts that TVC's predecessor-in-interest, Partners, deceived Mr. Oneida. *See* Response at ¶ 4. BWCC offers no facts to support this assertion. The facts before the Court that would be relevant are presented through the Creamer Affidavit and the Martens Affidavit, and they do not support a conclusion that TVC's predecessor and Mr. Martens were anything other than candid and straightforward with Mr. Oneida. In any event, TVC's Motion to Dismiss is not grounded on equity but rather the law of the case in the SRBA barring collateral attacks.

IV. CONCLUSION

For the above-stated reasons, BWCC's objections to IDWR's recommendations of the above-captioned water right claims should be dismissed. BWCC has ignored the repeated and consistent decisions of this Court barring collateral attacks on IDWR decisions, both in filing its objections and in its Response. TVC is entitled to its attorneys' fees for having to defend against BWCC's improper objections.

DATED this 31st day of July 2008.

GIVENS PURSLEY, LLP

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

MICHAEL C. CREAMER

Attorneys for The Valley Club, Inc.

FAX

TO: '12082876700@venali.net'

FROM: Caralea Hopingardner

FAX: 12082876700

DATE: Thu, 31 Jul 2008 17:08:45 -0600

RE: The Valley Club's Reply to BWCC's Response to Motion to Dismiss Objections - With Attachments

MESSAGE

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RE: Subcase Nos. 37-00494, 37-00495, 37-00577BU, 37-00577BV, 37-00657B, 37-00833K, 37-02623

Pages (including cover sheet): 15

Message: Attached are The Valley Club, Inc.'s Reply to Big Wood Canal Company's Response to Motion to Dismiss Objections and Request for Attorney Fees and Affidavit of Gerald Martens, P.E., L.S., which were fax filed with the SRBA today.

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