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DEPARTMENT OF
WATER RESOURCES

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James P. Speck, ISB No. 2067

Speck & Aanestad, A Professional Corporation

120 East Avenue

P.O. Box 987

Ketchum, Idaho 83340

Telephone: (208) 726-4421

Facsimile: (208) 726-0752

Attorneys for Claimant, Elise G. Lufkin, and Respondents, Barker Living Trust, Chaney Creek Ranch, LLC, Charles L. Matthiesen, Charles T. Foley, Eagle Creek Irrigation Co., ECD, Inc., , Gimlet Property Owners Association, Gregory Ranch, LLC, Lake Creek Meadows Homeowners, Michael E. Willard, Michael S. Engl, Myer Berlow, Ralph W. & Kandi L. Girton, James B. Fleig, Arnold Landau, Richard Dick, Dolores Pritchard, River Rock Ranch, LP, Roy R. Woods, Steven D. Holzman Trust, The Gulch Trust, John D. Pierce and The R. Daniel Olmstead Revocable Trust, and William B. and Debra Gordon

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 Nos. 37-496B and 37-497B
)
) CLAIMANT'S AND RESPONDENTS'
) SUPPLEMENTAL OPPOSITION TO
) OBJECTORS' MOTION TO AMEND
) OBJECTION
)

The Claimant, Elise G. Lufkin (hereinafter the "Claimant"), and Respondents, Barker Living Trust, Chaney Creek Ranch, LLC, Charles L. Matthiesen, Charles T. Foley, Eagle Creek Irrigation Co., ECD, Inc., Gimlet Property Owners Association, Gregory Ranch, LLC, Lake Creek Meadows Homeowners, Michael E. Willard, Michael S. Engl, Myer Berlow, Ralph W. & Kandi L. Girton, James B. Fleig, Arnold Landau, Richard Dick, Dolores Pritchard, River Rock Ranch, LP, Roy R.

**CLAIMANT'S AND RESPONDENTS' SUPPLEMENTAL
OPPOSITION TO OBJECTORS' MOTION TO AMEND OBJECTION - 1**

lufkin supplemental opposition to motion to amend objection.wpd

Woods, Steven D. Holzman Trust, The Gulch Trust, John D. Pierce and The R. Daniel Olmstead Revocable Trust, and William B. and Debra Gordon (hereinafter the "Respondents"), by and through their counsel of record, hereby supplement their Opposition to Objectors' Motions to Amend Objection filed in the present Subcases.

I. INTRODUCTION

On or about February 21, 2007, the Director of the Idaho Department of Water Resources (The "Director") filed his recommendations for the water rights which are the subject of these Subcases (the "Water Rights"). Copies of these recommendations are attached as Exhibits A and B to the Affidavit of James P. Speck in support of Claimants and Respondents' Opposition to Objector's Motion to Amend Objection filed contemporaneously herewith ("Speck Affidavit"). The proposed Amended Objections (the "Proposed Objections") appended to the Motions to Amend Objections filed in these Subcases primarily challenge the quantity of the Water Rights. On their face, the Proposed Objections appear to also challenge the priority date and purposes of use for the Water Rights.

On October 28, 1991, IDWR approved Transfer 3810 for the Water Rights. See Exhibit C to the Speck Affidavit. It can be readily seen that the source, quantity, priority date, point of diversion, purpose of use, period of use and place of use set forth in the recommendations for both Water Rights are identical to the elements of the same Water Rights described in Transfer 3810. The recommendations for the Water Rights also include remarks that match conditions of approval of Transfer 3810 to the effect that use of water under the Water Rights will be regulated by the

Watermaster of the State Water District No. 37, lockable controlling works subject to approval by the Idaho Department of Water Resources (“IDWR”) are to be maintained and measuring devices of a type approved by IDWR are required at both the point of diversion and point of discharge to the Big Wood River. (See Exhibits A, B and C to the Speck Affidavit). The Friends of the Big Wood River filed a protest to the original application for transfer and subsequently withdrew that protest. (See Exhibits D and E to the Speck Affidavit). No other person, specifically none of the Objectors, filed a protest, requested a hearing, or sought judicial review of the final transfer approval for Transfer 3810. (See Speck Affidavit Para.10).

II. ARGUMENT

A. THE MOTIONS TO AMEND SHOULD BE DENIED AS THE PROPOSED OBJECTIONS DO NOT PRESENT A MERITORIOUS POSITION OR A VALID CLAIM.

In the Claimant’s and Respondents’ Opposition to Objectors’ Motion to Amend Objection previously filed in both of the present Subcases, Claimant and Respondents contend that the Objectors’ Motions to Amend Objections should be treated as requests to file late objections and must fail, among other reasons, because they fail to present a meritorious position. In the alternative, as motions to amend objections, they must also fail because they fail to state a valid claim. The Proposed Objections do not meet either standard as they constitute a collateral attack on the prior administrative decision by IDWR approving Transfer 3810 which this Court should find is barred by the “law of the case” on that issue.

1. The Administrative Approval Process for Water Right Transfers Essentially Mirrors That for Issuing Water Right Permits and Licenses

Water right transfers are approved in a process that essentially mirrors water right permit and license approval. When an application for either a permit or a transfer is received, IDWR must prepare notice of the application. *Compare* Idaho Code §42-203A(1) (IDWR must prepare notice of application for a license) *with* Idaho Code §42-222(1) (notice of transfer applications must be provided in a similar manner to Idaho Code §42-203A). For both permits and transfers, persons wishing to protest must do so within ten days of the last publication of notice. *Id.* If either a permit or transfer application is protested, IDWR must hold a hearing in accordance with Idaho Code §42-1701A. *Compare* Idaho Code §42-203A(5) (hearing must be conducted in accordance with Idaho Code §42-1701(A)) *with* Idaho Code §42-221(1) (hearing must be held if a protest is filed) *and* Idaho Code §42-222(5) (if no protest was filed and no hearing held, aggrieved persons may request a hearing under Idaho Code §42-1701A(3)). Only after a hearing by IDWR may a party request judicial review *of a transfer or a license*. *Compare* Idaho Code §42-203A(5) (after a hearing on a license a person aggrieved by the determination may seek judicial review under Idaho Code §42-1701(A)(4)) *with* Idaho Code §42-222(5) (after a hearing on a transfer a person aggrieved by the determination may seek judicial review under Idaho Code §42-1701(a)(4)). In short, the public notice requirements and the process for seeking administrative and judicial review of permits, licenses and transfers are almost identical.

2. The Law Of the Case Bars Objectors from Litigating the Claims Set Forth in Their Proposed Objections.

In his *Order Granting United States' Motion for Summary Judgment and Special Master Report*, Subcases 55-2414, et al., October 5, 2005, Special Master Terrence A. Dolan was faced with a motion for summary judgment filed by the United States to dismiss objections filed by

LU Ranching against six water rights recommended to the United States based on licenses. LU Ranching supported its opposition to the summary judgment motion with an affidavit from its vice-president stating he had received no notice of the United States' applications for permits to appropriate the waters and, had he received such notice, he would have protested the applications. Special Master Dolan, in granting the United States motion and dismissing the LU Ranching objections, described the "law of the case" established in two decisions issued by then Presiding District Judge Barry Wood in 1999 and 2000. He noted that in the *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcases 36-2708, et al., December 29, 1999, Judge Wood held that all parties to a license proceeding are barred from challenging any of the elements of the licensed water right in a subsequent judicial proceeding such as the SRBA as such a challenge would constitute a collateral attack on the license. Special Master Dolan then went on as follows:

However, less than three months later, Judge Wood entered another order concerning collateral tax on licenses issues by IDWR. This time, Judge Wood held that parties to the licensing process **and** non-parties are barred from collaterally attacking a license in SRBA proceedings:

The license *per se*, and the right it created, is not subject to collateral attack within the SRBA proceedings. Unlike a federal Reserved right, a constitutionally based claim under state law, or perhaps a claim based on a private decree, the [Nez Perce] Tribe cannot attack the elements of an underlying licensed right in the SRBA at this late date. There will be no fact finding concerning the elements determined during licensing. An objection to a licensed right cannot be a late substitute for an appeal of IDWR's administrative decision concerning the merits of the right created by the license. If a license

is not appeal when issued, any attempt to appeal the license in a subsequent judicial proceeding, e.g., the SRBA, would constitute an impermissible collateral attack on the license [*Mosman and Bone, supra*]

Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood, consolidated subcase 03-10022, March 23, 2000, at 33.

Order Granting United States' Motion for Summary Judgment and Special Master Report, Subcases 55-2414, et al., October 5, 2005, p.7.

Special Master Dolan then concluded by noting that former presiding Judge Roger S. Burdick had unequivocally reminded the special masters of the SRBA Court of their duty to follow legal rulings of the District Court, quoting him as follows:

[U]ntil such time as a decision is appealed and precedent established, rulings by the District Court are considered to be law of the case in the SRBA and the special masters are expected to follow such rulings [citations omitted].

Memorandum Decision and order on Challenge, subcase 65-5663B, May 9, 2002, at 9-10.

Id., p.8.

Almost exactly one year later, presiding Judge John M. Melanson addressed challenges by the City of Pocatello to certain elements of its own water rights as recommended in the SRBA based on prior decrees and licenses. ***Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law***, Subcase No. 29-11609 (City of Pocatello-Federal Law Claims), 10 SRBA 15, October 6, 2006. Judge Melanson first noted that,

Although decrees issued in a prior adjudication are not conclusive as to the proof of existence of a water right, prior decrees are binding on

the parties to the decree and their privies. *State v. Hagerman Water right Owners*, 130 Idaho 736, 741-42, 947 P.2d 409, 414-15 (1997) A prior decree is not considered “conclusive” because it cannot insulate the water right from re-examination of subsequent use.

Id. at p.15.11.

Then, citing Judge Woods ruling in the *Facility Volume* case, Judge Melanson stated that, “Licenses are and have been consistently treated in the SRBA the same as prior decrees for the purpose of binding the parties and their privies.” *Id.* Judge Melanson then distinguished the conclusive effect of prior decrees and licenses in the following statement:

Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies.

Id. at p.15.12.

In the referenced footnote, Judge Melanson stated, “Publication notice is given and any affected person can initiate a contested case.” *Id.* at footnote 4.

Although the above-described “law of the case” arises out of challenges to licensed water rights, the legal basis for the decisions creating the “law of the case” is exactly the same when applied to IDWR administrative approvals of water right transfers. The opportunities for protest, hearing and judicial review of IDWR actions are virtually identical for license and transfer administrative proceedings. Thus the policy barring collateral attacks must also be the same and an objection filed in the SRBA seeking to challenge any of the elements of a water right as set forth in an approved transfer must also be viewed as an impermissible collateral attack on a prior administrative decision which could and should have been appealed at the time it was issued.

In the present Subcases, notice of the transfer applications was published on two occasions, a protest was actually filed and then withdrawn by an entity which is not a party to the present Subcases, and none of the Objectors filed a protest, sought a contested hearing pursuant to Idaho Code §42-1701A(3) or otherwise appealed the final administrative decision by IDWR approving Transfer No. 3810. Instead, the Objectors now seek to amend their objections and challenge certain specific elements of Claimant's water rights. Each of the elements under attack was addressed, decided and listed in approved Transfer 3810. Therefore, the claims made by the Proposed Objections are barred by the "law of the case" extended and applied to water rights established through an administrative transfer proceeding. Furthermore, in paragraph E, Reasons Supporting Objection(s), attached to each Proposed Objection, Objectors request certain provisions for measurement and administration that are already included in the recommendations for the Water Rights in these two Subcases, and as noted in Claimant's and Respondents' Opposition to Objectors' Motion to Amend Objection, water quality issues are outside of the purview and jurisdiction of the this Court and therefore not an issue in these Subcases. Simply put, the Proposed Objections do not present a meritorious position nor can they possibly be viewed as valid claims in light of the above authority. Thus, whether viewed as a motion to file a late objection or a motion to amend their present objection, the Objectors' Motions to Amend must be denied.

CONCLUSION

For the reasons set forth both herein and in Claimant's and Respondents' Opposition to Objectors' Motion to Amend Objection, the Objectors' Motions to Amend filed in the present

Subcases should be denied and Claimant and Respondents should be awarded their attorneys fees and costs incurred in defending the original Objections filed herein and the Motions to Amend.

RESPECTFULLY SUBMITTED this 22 day of August, 2008.

SPECK & AANESTAD
A Professional Corporation
Attorneys for the Claimant and Respondents

By 
James P. Speck

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 of August, 2008, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

Clerk of the District Court	☒	United States Mail
Snake River Basin Adjudication	☐	Hand Delivery
253 Third Avenue North	☐	Overnight
PO Box 2707	☐	Facsimile
Twin Falls, ID 83303-2707	☐	Email

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Office of the Attorney General	☐	Hand Delivery
State of Idaho	☐	Overnight
PO Box 44449	☐	Facsimile
Boise, ID 83711-4449	☐	Email

United States Department of Justice
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

☒ United States Mail
☐ Hand Delivery
☐ Overnight
☐ Facsimile
☐ Email

Albert P. Barker
John K. Simpson
Shelley M. Davis
Barker, Rosholt & Simpson, LLP
P.O. Box 2139
Boise, ID 83701

☐ United States Mail
☐ Hand Delivery
☐ Overnight
☒ Facsimile
☐ Email

Craig Hobdey
Hobdey & Hobdey
P.O. Box 176
Gooding, ID 83330

☐ United States Mail
☐ Hand Delivery
☐ Overnight
☒ Facsimile
☐ Email

Fritz Haemmerle
Haemmerle & Haemmerle PLLC
400 S. Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333

☐ United States Mail
☐ Hand Delivery
☐ Overnight
☒ Facsimile
☐ Email

Scott L. Campbell
Andrew J. Waldera
Dylan B. Lawrence
101 S. Capitol Blvd. 10th Floor
P.O. Box 829
Boise, ID 83701

☐ United States Mail
☐ Hand Delivery
☐ Overnight
☒ Facsimile
☐ Email


James P. Speck