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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - 5th Fifth Judicial District County of Twin Falls - State of Idaho	
SEP 16 2008	
By _____	Clerk
_____	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) Subcases 78-00182, 78-00206A, 78-12128,
Case No. 39576) 78-12162, and 78-12165
)
) ORDER DENYING MOTION TO ALTER
) OR AMEND
)

On June 27, 2008, the claimants of water right 78-00206A, Jennifer Eld and Barbara Clancy (hereinafter "Claimants"), filed a *Motion to Alter or Amend*, asserting that this Special Master's previous recommendation of disallowance for water right claim 78-00206A was in error. For the reasons stated on the record at the September 12, 2008, hearing, and as set forth herein, the *Motion to Alter or Amend* is **denied**.

In their written *Motion*, Ms. Eld asserts that the water district responsible for administration of water rights in the area (Goose Creek Water District 78C) has not performed due diligence in their record keeping, which has resulted in the Water District failing to notify the Claimants of Water District meetings, nor have they been notified of any monies owed to the Water District. The Claimants assert that the alleged dereliction of duty on the part of the Water District resulted in the non-delivery of the subject water right, and therefore the non-use of the water was beyond the control of the appropriator, and as such they have a defense to forfeiture. See I.C. § 42-223(6).

At trial, Tana Kirby, the Treasurer of the Goose Creek Water District 78C testified that she has no record of any billing for water usage on the Claimant's property. The Claimants did not elicit any information from this witness that would demonstrate that the Water District had not performed its duties regarding water delivery or billing for the Claimant's land. At or prior to trial, the Claimants did not assert the defense to forfeiture that they now assert through their *Motion to Alter or Amend*. In other words

they are now attempting to raise a new legal theory, which would necessarily require the presentation of additional factual evidence, in a post-trial motion.

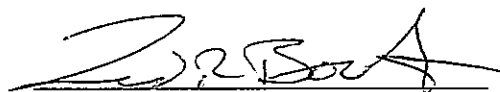
The purpose of a motion to alter or amend is to provide a means for a trial court to correct errors of fact and/or law short of an appeal. *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase nos. 36-02708 et al., (December 29, 1999), p. 20-21, (citing *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct App. 1982)). While a motion to alter or amend may be based upon newly discovered evidence, the movant is not allowed to introduce evidence that was available at trial but not proffered. *Id.* Likewise, a motion to alter or amend is not a mechanism to advance new legal theories that were not asserted at trial. *Id.*

The defense to forfeiture now proffered by the Claimants, i.e. that I.C. § 42-223(6) provides a defense to forfeiture where the "non-use results from circumstances over which the water right owner has no control," is a legal theory that was not advanced at trial. Such a theory would necessarily require the introduction of factual evidence to demonstrate that the non-use was indeed beyond the control of the predecessor-in-interest to the claimants. This Special Master's finding that water right 78-00206A had been forfeited was based primarily upon the testimony of Darrell Campbell, who leased the subject land beginning in 1970. Darrell Campbell testified that he never irrigated the land during his tenancy. No factual evidence was presented to demonstrate that Darrell Campbell, or his landlord the McMahans, had the inability to irrigate the land due to the fact that the Water District failed to notify them of Water District Meetings, or of monies due the Water District, or by reason of any other circumstances beyond the control of Darrell Campbell and or the McMahans.

The Claimants *Motion to Alter or Amend* attempts to advance a new legal theory, which would necessarily require the presentation of additional evidence. This is not the proper role of a motion to alter or amend. Accordingly, the *Motion* is denied.

IT IS SO ORDERED

Dated Sept. 16, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on September 16, 2008, with sufficient first-class postage to the following:

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