

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 436-4717
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

*Attorneys for American Falls Reservoir
District #2*

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

**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. 22-594**
)

) **JOINT MOTION FOR PARTIAL**
) **CONSOLIDATION**
)
)

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company and Twin Falls Canal Company (hereinafter collectively referred to as the

RECEIVED
MAR 26 2009
DEPARTMENT OF
WATER RESOURCES

“Coalition”), Respondents in the above-referenced subcase, by and through counsel of record, and move the Court for an order partially consolidating water right 22-594. This motion is made pursuant to Idaho Rule of Civil Procedure 42(a) and the Special Master’s December 22, 2008 *Trial Scheduling Order*. As discussed below, the Special Master should consolidate the issues raised by the *Objections* filed by Fremont Madison Irrigation District and Woodmansee Johnson Canal Company (collectively referred to as “FMID”), on July 24, 2007, with the other subcases in Basins 21, 22 and 27 – all addressing the same issue.

INTRODUCTION

In addition to water right 22-594, FMID’s July 24, 2007 *Objection* was also filed on 13 additional water rights.¹ The *Objection* asserts that water is recovered under the right and used on FMID lands (the “recaptured water issue”). In addition to these 13 subcases, there are a significant number of additional objections, each asserting the right to use recovered water, filed in Basin 01 (water right 1-1J, *et al.*), Basin 21 (water rights 21-48, *et al.*), Basin 22 (water right 22-2303B, *et al.*) and Basin 27 (water rights 27-2125A, *et al.*). The Coalition has responded to each of these objections. Aside from water right 22-594, all remaining Basin 21, 22 and 27 subcases are pending before Special Master Bilyeu and are on the same litigation tract. The claimants, objectors and respondents to these other subcases are currently involved in settlement discussions and no trial has been scheduled.

Water right 22-594 has been separated from the group of recovered water subcases because of an overlapping issue – unrelated to the recaptured water issue – that it shares with three other water right (water rights 22-265E, 22-4195 and 22-13479). These water rights have all been objected to by George Brown, who asserts that the water rights should not exist for

¹ These water rights are: 22-205, 22-235, 22-344, 22-534, 22-421, 22-422, 22-476, 22-477, 22-591, 22-592, 22-593, 22-11259 and 22-11260.

reasons wholly unrelated to the recaptured water issue. According to the *Trial Scheduling Order*, these four subcases (including 22-594) are set for trial on September 16-17, 2009.

STATEMENT OF FACTS

On July 24, 2007, FMID objected to a group of Basin 22 water rights, including water right 22-594, asserting that the water diverted under the right is subsequently recovered and used on FMID lands. Similar objections had been filed in Basins 01, 21, 22 and 27 by various claimants and objectors, including FMID and others.

In addition, a separate objection has been filed by George Brown as to four water rights in Basin 22. Only one of the water rights subject to the *Brown Objection* (22-594) overlaps with the *FMID Objections*. Mr. Brown's objection to these four water rights asserts that they should not exist for reasons including a violation of the Stream Channel Protection Act. Mr. Brown does not claim any interest or involvement in the recovered water issue.

On September 25, 2007, the Coalition submitted a response to the *FMID Objections*. The Coalition did not respond to the *Brown Objection*.

Given the overlapping issues raised by the *Brown Objection*, water right 22-594 was removed from the group of water rights addressing the recovered water issue and included in the group of water rights addressing the issues raised by the *Brown Objection*. A trial is currently set for these water rights on September 16-17, 2009.

As to the Basin 21, 22 and 27 recaptured water subcases, the claimants, objectors and respondents have been involved in negotiations, seeking to resolve the matter without going to trial. These negotiations would include resolution to all Basin 21, 22 and 27 recaptured water subcases (including water right 22-594). There is currently no trial set for the other recovered water subcases.

ARGUMENT

Civil Rules 42(a) provides the standard for the consolidation of separate trials:

When actions involving a *common question of law or fact* are pending before the Court, it may *order a joint hearing or trial of any or all the matters in issue* in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to *avoid unnecessary costs or delay*.

(Emphasis added).

Consolidation of the recaptured water issue is appropriate in this subcase. First, the issues raised in the FMID *Objections* involve “a common question of law or fact” with the other Basin 21, 22 and 27 subcases – all raise the recaptured water issue. To the contrary, the issues presented in the Brown *Objection* are wholly distinct and separate from the issues raised in the FMID *Objection*. Rather than addressing the use of recaptured water on FMID lands, Mr. Brown objects to the very existence of water right 22-594.

Second, the Civil Rules specifically provide that the Court may consolidate “any or all” of the issues. Here, the issues raised by the Brown *Objection* are on a litigation tract – set for trial on September 16-17, 2009. On the other hand, the recovered water subcases are on a settlement tract – with no trial currently set. In light of this, it is appropriate to consolidate the recaptured water issue with the other Basin 21, 22 and 27 subcases, leaving the issues raised by Mr. Brown to be resolved in the September 16-17, 2009 trial.

Finally, consolidation of the recaptured water issue is appropriate to “avoid unnecessary costs or delay.” There is no reason to require that the recaptured water issues raised in water right 22-594 to proceed to trial separate from and prior to any trial in the remaining recaptured water subcases. To require such could engender unnecessary costs and delay.

For example, there are a significant number of other parties who have filed objections or responses relative to the recaptured water issue in the other Basin 01, 21, 22 and 27 subcases. All are participating in the settlement discussions and all have an interest in the resolution of this issue. Yet, only a few of the parties are involved in this subcase. Allowing this single subcase to move forward to trial, without the involvement of the other claimants, objectors and/or respondents could delay or derail the negotiations in the other Basin 21, 22 and 27 subcases.

Any decision by the Special Master following to the September 16-17 trial relative to the recaptured water issue would set a precedent for the other recaptured water subcases pending before the SRBA. Allowing this single subcase to move forward to trial may prompt a rush by the other recaptured water parties in Basins 01, 21, 22 and 27 to seek to intervene or otherwise participate in these proceedings to protect their interests in that decision. Should that occur, the parties would be forced to shift their focus from negotiating a resolution to preparing for trial. Such a result would be unnecessary. Accordingly, partial consolidation (only as it relates to the recaptured water issue) is appropriate.

CONCLUSION

Partial consolidation is appropriate in this case to ensure that the recaptured water issue raised by the FMID *Objections* are heard and resolved in association with the other recaptured water subcases in Basins 21, 22 and 27. Accordingly, the Special Master should issue an order consolidating the recaptured water issue with the other Basin 21, 22 and 27 subcases.

//

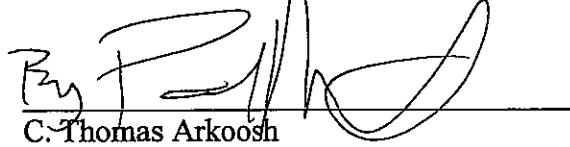
//

//

//

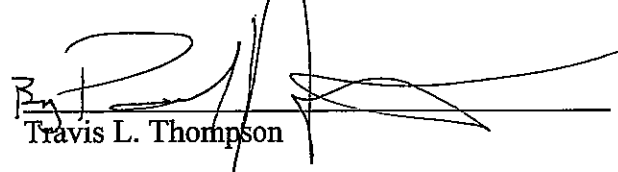
RESPECTFULLY SUBMITTED this 25th day of March, 2009.

CAPITOL LAW GROUP PLLC


C. Thomas Arkoosh

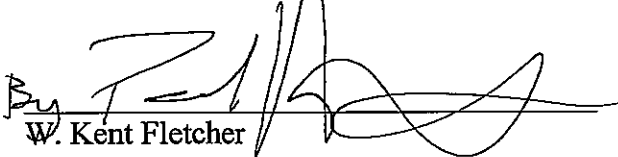
Attorneys for American Falls Reservoir District #2

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
Company

FLETCHER LAW OFFICE


W. Kent Fletcher

Attorneys for Minidoka Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2008, I served a true and correct copy of the foregoing **RESPONSE TO IGWA'S SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO PARTICIPATE** on the person(s) listed below, in the manner indicated:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☐ Email

Jerry R. Rigby
**RIGBY THATCHER ANDRUS RIGBY
KAM & MOELLER, CHTD.**
PO Box 250
Rexburg, ID 83440-0250

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☒ Email

Joseph F. Brown
4094 S. Federal Way, Ste K102
Boise, ID 83716

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☐ Email

US Department of Justice
Division of Env. & Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83706-1234

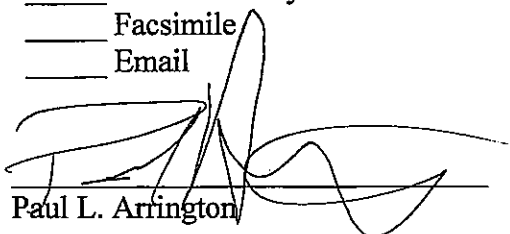
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☐ Email

Randall C. Budge
Candice M. McHugh
**RACINE OLSON NYE BUDGE &
BAILEY, CHTD.**
PO Box 1391
Pocatello, ID 83201

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☒ Email

DKJ Farms, LLC
665 Centennial Loop
Rexburg, ID 83440

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile
☐ Email


Paul L. Arrington