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DEPARTMENT OF  
WATER RESOURCES

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**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. 01-23B, 01-297, 35-2543, 35-4246

**MEMORANDUM IN SUPPORT OF  
CLAIMANT'S MOTION FOR SUMMARY  
JUDGMENT AND OTHER MOTIONS**

Aberdeen-Springfield Canal Company ("Claimant"), by and through counsel of record, respectfully submits this Memorandum in Support of Claimant's Motion for Summary Judgment and Other Motions pursuant to Rule 7 of the Idaho Rules of Civil Procedure and the Court's Trial Schedule Order dated September 2, 2008.

**I. INTRODUCTION**

Claimant's Water Right Claim Nos. 01-23B, 01-297, 35-2543 and 35-4246 (collectively "Claimant's water rights") are all "Recommended" by the Idaho Department of Water Resources ("Department") as set forth in the Amended Director's Reports dated March 21, 2008 ("Director's Reports"). In response to the Director's Reports, American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company, commonly known as the

"Surface Water Coalition" (collectively "SWC Objectors") filed identical Standard Form 1 Objections to the Claimant's Water Rights as recommended. With respect to subcase 01-23B, objections were filed to the "priority date," "purpose of use," "place of use," and "remarks." With respect to subcases 01-297, 35-2543 and 35-4246, objections were filed to the "place of use" and "remarks." The SWC Objectors failed to indicate what each objected-to element of the Claimant's water right should be, or otherwise provide information in support of their objections. Further, despite this Court's subsequent instruction to the SWC Objectors to support their objections, no such information has been forthcoming. Therefore, Claimant requests an Order granting a "Partial Decree" for each of Claimant's water rights as recommended in the Director's Reports.

## **II. LEGAL STANDARD**

Summary judgment is proper when "the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party." *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006). Yet, to withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853 (Ct. App. 1986).

## **III. THE COURSE OF THE PROCEEDINGS**

Each of Claimant's water rights was initially claimed in the early years of the SRBA

claims process. Claim Nos. 01-23B and 01-297 are based on prior court decrees, and Claim Nos. 35-2543 and 35-4246 are based upon prior licenses issued by the Department. The Department recommended each of these rights in the original Director's Reports. None of the Objectors filed any objection to the original recommendations.

With regard to the Claimant's water right numbers 01-23B and 01-297, objections were originally filed by the Claimant and the Bureau of Reclamation ("Reclamation"). The Claimant objected to the "place of use" and paragraphs 1 and 2 of the "other provisions." Reclamation objected to certain of its land included in the digital boundary defining the place of use. These objections were resolved with additional map review and the aid of the Department. Because the corrected place of use involved more acres than originally claimed, it was necessary for Claimant to file an Amended Claim which was approved by Order dated June 21, 2007. The Amended Director's Reports followed on March 21, 2008, which gave rise to new objections by the SWC Objectors.

With respect to the Claimant's water right numbers 35-02543 and 35-04246, there was a long course of proceedings that commenced in 1999 and culminated on March 13, 2002, with a completed Administrative Proceeding and Amended Director's Report, as reflected in the SRBA Subcase Summary Report. The Claimant's objection to the recommended place of use of these water rights was likewise resolved by the filing of Amended Claims and the Amended Director's Reports dated March 21, 2008. The SWC Objectors also filed new objections to these rights as discussed above.

A Trial Scheduling Order was entered on September 2, 2008, setting the matter for trial on June 8, 2009, with a discovery deadline of March 6, 2009, and dispositive motion deadline

March 27, 2009. Claimant filed Discovery Requests on March 5, 2009, consisting of Interrogatories and Requests for Production. No Answers have been filed by the SWC, which are past-due, by reason of which the Claimant filed a Motion to Compel along with its Motion for Summary Judgment on March 26, 2009.

#### IV. STATEMENT OF UNDISPUTED FACTS

Based on the record before the Court, the Claimant submits that the following material facts are undisputed and entitles it to summary judgment as a matter of law.

1. Claimant filed claims which are pending in the SRBA for Water Right Nos. 01-23B, 01-297, 35-2543 and 35-4246. Claim Nos. 01-23B is based upon the *Rexburg Decree*<sup>1</sup> and Water Right No. 01-297 is based upon the *Henry Eagle Decree*<sup>2</sup>. Water Rights 35-2543 and 35-4246 are based upon licenses issued by the Department.
2. Each of said Water Right Claims of Claimant were recommended in the Director's Reports. (Amended Director's Reports issued March 21, 2008; Aff. of Randall C. Budge at ¶ 2, Ex. 2.)
3. The Water Right Recommendations contained in the Amended Director's Reports for Claimant's Water Right Nos. 01-23B, 01-297, 35-2543 and 35-4246 accurately reflect each element of these water rights, including the proper priority date, quantity, purpose of use, period of use and place of use. (Aff. of Anthony Olenichak at ¶¶ 10, 11; Aff. of Steven T. Howser at ¶¶ 5-11.)

#### V. ARGUMENT

The evidence on record in these subcases contains no genuine dispute of material fact and clearly and convincingly establishes that each of the Claimant's water right numbers 01-23B, 01-297, 35-2543 and 35-4246 have been diverted and applied to beneficial use in the manner claimed and as recommended in the Director's Reports for the Claimant's water right. (Aff. of

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<sup>1</sup> *Rexburg Irrigation Company, et al. v Teton Irrigation Canal Company, et al*, Sixth Judicial District Court, Fremont County; Decree entered December 16, 1910, commonly known as the "Rexburg Decree."

Tony Olenichak at ¶¶ 9, 10; Aff. of Steven T. Howser at ¶¶ 5-11.) The Director's Reports are a matter of record<sup>3</sup> and constitute *prima facie* evidence of the nature and extent of the water rights, placing the burden on the SWC Objectors to come forward with evidence to rebut the Director's Reports as to all issues objected to. Specifically, Idaho Code § 42-1411 states, in relevant part:

(4) ... Upon filing with the Court, the Director's Report, except for the explanatory material referred to in subsection (1) of this section, **shall constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law.** The unobjected to portions of said Director's Report shall be decreed as reported.

(5) ... **Any party filing an objection to any portion of the Director's Report shall have the burden of going forward with the evidence to rebut the Director's Report as to all issues raised by the objection. ...**

(Emphasis added.)

So far, however, the SWC Objectors have provided no evidence to rebut the Directors' Reports. In fact, the SWC Objectors did nothing more than simply "check the box" on their SF-1 Objections. They did not complete the form by indicating what the objected-to element "should be," as required by the instructions for completing the form.

Based upon the record presently before the Court, there are no material issues of fact in dispute and the Claimant is entitled to summary judgment as a matter of law that Partial Decrees should be entered for each of Claimant's water rights as recommended in the Director's Reports.

## **VI. MOTION TO CLARIFY TRIAL SCHEDULING ORDER**

The Trial Scheduling Order dated September 2, 2008, resulted from the scheduling conference conducted on August 28, 2008, with the dates set by consensus of the parties as

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<sup>2</sup> *Aberdeen-Springfield Canal Company et al v. Henry Eagle, et al.*, Seventh Judicial District Court, Fremont County; Supplemental Decree entered March 12, 1969, commonly known as the "Henry Eagle Supplemental Decree."

<sup>3</sup> Copies of the Directors Reports are also attached as Exhibit 1 to the Affidavit of Randall C. Budge.

follows:

|                |                                                |
|----------------|------------------------------------------------|
| March 6, 2009  | Discovery cut-off; discovery shall be complete |
| March 27, 2009 | Deadline to file dispositive motions           |
| May 21, 2009   | Pre-trial conference by telephone              |
| June 8, 2009   | Trial                                          |

Accordingly, the Claimant served discovery requests upon the Objectors on March 5, 2009.

However, on March 24, 2009, Objector Minidoka Irrigation District filed a Notice of Objection to Discovery, asserting that the deadline to propound discovery was some time before March 6, 2009, and that the Claimant's filing of discovery on March 5 violates the Trial Schedule Order dated September 2, 2008. None of the SWC Objectors have answered the Claimant's discovery requests, which are now past due, nor have they disclosed or made available any trial witnesses for deposition.

It has always been the understanding of counsel for the Claimant that the March 6 cut-off was a deadline to submit discovery requests rather than a deadline to submit discovery responses. Being more than 90 days before trial, the filing of discovery requests by the deadline provides ample time to complete discovery before trial. Therefore, counsel for the Claimant agreed to the trial schedule at the August 28 conference based upon the understanding and belief that the discovery and dispositive motion deadlines are deadlines to submit or file these matters, not complete the same.

If, contrary to the understanding of the Claimant, the discovery cut-off is now interpreted to be the deadline to respond to discovery rather than propound discovery, then the Objectors will in effect be given an opportunity to undertake "trial by ambush." Claimant will be unduly prejudiced by reason of a misunderstanding by its counsel, full and fair trial on the merits

potentially thwarted, and the interests of justice undermined. (Randall C. Budge Affidavit at ¶4.) Accordingly, Claimant has filed a Motion to Clarify Discovery Deadline and Alternative Motion to Extend Discovery.

Since all SWC Objectors have refused to respond to the Claimant's discovery request and apparently will join in the contention by Minidoka Irrigation District that the deadlines were intended as dates to respond to, rather than submit, discovery requests, this Court needs to clarify the intent of the Trial Schedule Order. If in fact the deadlines were submission deadlines, then Claimant's Discovery Requests and Motion for Summary Judgment are both timely and the Objectors should be required to timely respond. If not, then to avoid undue prejudice to Claimant, all dates should be re-set to afford the contemplated full and fair opportunity for discovery, dispositive motions and trial.

#### **VII. MOTION TO COMPEL**

On March 5, 2009, Claimant submitted Interrogatories and Requests for Production and also a Notice of Taking Deposition Duces Tecum to the Objectors, seeking to depose each of the witnesses disclosed by Objectors commencing on April 1, 2009. Copies of these Discovery Requests and the Deposition Notice are attached as Exhibit 2 to the Affidavit of Randall C. Budge. To date, no SWC Objector has answered any of these discovery requests nor disclosed nor made available any trial witnesses for deposition. Accordingly, Claimant filed simultaneous with their Motion for Summary Judgment a Motion for Order Compelling Discovery pursuant to I.R.C.P. Rule 37A. With the trial date set for June 8, 2009, there is ample time to complete discovery without prejudice to the Objectors. Should the SWC Objectors somehow assert they

are prejudiced, then Claimant requests an extension of the discovery deadline to complete the requested discovery and a continuance of the trial date to avoid prejudice to either party.

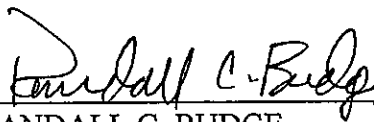
**CONCLUSION**

Based upon the foregoing, Claimant's Motion for Summary Judgment should be granted and each of Claimant's Water Right Claims partially decreed as recommended in the Director's Report. The Court should clarify whether the March 6, 2009, discovery cut-off set forth in the Trial Scheduling Order is a deadline to serve or respond to discovery requests. If the Court interprets the March 6 date as the deadline to respond to discovery, then the Trial Scheduling Order should be modified to accommodate Claimant's Discovery Requests. Finally Claimant's Motion to Compel should be granted.

RESPECTFULLY SUBMITTED,

DATED this 26<sup>th</sup> day of March, 2009.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

  
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RANDALL C. BUDGE