

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

RECEIVED
APR 20 2009
DEPARTMENT OF
WATER RESOURCES

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 Minidoka Irrigation District

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	)	Subcase Nos. 01-23B, 01-297, 35-2543 & 35-4246
	)	
Case No. 39576	)	OBJECTORS' RESPONSE TO CLAIMANT'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	

COME NOW, Objectors, American Falls Reservoir District #2, A&B Irrigation District,
Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side
Canal Company, and Twin Falls Canal Company, by and through counsel of record, and
pursuant to I.R.C.P. 56(c), and hereby submit this *Response to Claimant's Motion for Summary*

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT

1

Judgment, in the above-referenced subcases.¹ As set forth below, the motion filed by Aberdeen-Springfield Canal Company (“ASCC”) should be denied.

INTRODUCTION

Following the Director’s submission of an Amended Director’s Report on the above water rights, the Objectors filed timely *Objections* to the recommendations. The validity of these *Objections* was confirmed through the Special Master’s July 16, 2008, *Order Denying Motion to Strike Objections and Order Granting Motion to File Late Response*. ASCC failed to submit any timely discovery requests prior to the discovery deadline. Now, as a result of its failure to propound any timely discovery, ASCC claims that it doesn’t have enough information, that the *Objections* must be denied and that summary judgment must be entered. The law does not support such a demand.

REBUTTAL STATEMENT OF UNDISPUTED FACTS

The ASCC water rights subject to this motion were previously decreed and/or licensed and were recommended in an amended Director’s Report, issued March 21, 2008. However, the rights were not recommended “accurately” as claimed by ASCC. For example, the *Objector’s Motion for Summary Judgment* discusses the Director’s recommendation of “recharge for irrigation” on water right 1-23B. Since water right 1-23B was previously decreed for “irrigation” purposes only, and recharge was not considered a beneficial use in Idaho until 1978, it is impossible that ASCC could have diverted and beneficially used any water for this purpose in 1895 (the recommended priority date for water right 1-23B). Accordingly, the affidavits filed

¹ The Objectors also file *Objections* for water right 35-2543 and 35-4246. Upon further review of the recommendations, and following discussions with council for ASCC, the Objectors have decided to withdraw their objection to these water rights.

in support of ASCC's motion are disputed as to this element and do not establish that ASCC is entitled to a "recharge for irrigation" purpose of use as a matter of law.

ARGUMENT

ASCC's motion should be denied. ASCC claims that, since there is no evidence on record yet to dispute the recommendation, the *Objections* should simply be denied and summary judgment is appropriate. The law and facts, however, do not support this contention.

Idaho Code provides that an objector bears the burden in relation to the issues raised in the objection. *See* Idaho Code § 42-1411(5). This burden, however, does not mean that an objector is obligated to perform discovery on behalf of the claimant or put on any facts before trial. Stated another way, the Objectors' burden of proving their objections at trial does not create an obligation to provide ASCC with responses to untimely or nonexistent discovery requests. ASCC has cited to no law that would require otherwise. The Objectors do not have to put on their case *before* trial as ASCC seems to suggest.

Furthermore, the evidence before the Special Master belies the claim that there are no "material issues of fact in dispute." *See ASCC Memo* at 5. For example, as discussed in the Objector's *Motion for Summary Judgment*, the Director wrongly recommended water right 1-23B with an additional purpose of use for "recharge for irrigation." That recommendation cannot stand, as a matter of law. The law is clear – "recharge" was not a recognized beneficial use until 1978. As such, ASCC could not have legally used its water for "recharge" in 1895 – or at any time prior to 1978. However, should the Special Master deny the Objector's motion, then several issues of fact will be presented. Such issues include the date when the "recharge" use allegedly began, how the "recharge" use was implemented within the place of use, how the

quantity of “recharge” was determined, how the “recharge” use is monitored and how the “recharge” use could have an 1895 priority date.

Moreover, since ASCC is claiming an “accomplished transfer” there are other statutory prerequisites to address as well, including proving that no other water rights were injured on the date of the change. *See* Idaho Code § 42-1425. Finally, the remark related to the Agreement between ASCC, IDWR, and the State of Idaho has changed from the original recommendation to that contained in the Amended Director’s Report. *Compare Arrington Aff.* Ex. A (Recommendation dated 5/11/2006) *with* Ex. B (Amended Recommendation dated 3/21/2008). Whereas the original recommendation included certain language about the implementation of the Agreement, the amended recommendation has changed and just references the Agreement. This change raises an issue of fact considering the implementation and effect of the Agreement. However, the remark is only relevant in the event the “recharge for irrigation” purpose of use is not dismissed as requested by the Objectors’ *Motion for Summary Judgment*.² These are specific issues of fact that must be addressed. These issues specifically implicate the priority date, purpose of use, place of use and remarks on water right 1-23B.

Another issue of fact is raised by a second remark on water right 1-23B. The remark provides that “Diversion of rights 1-23B *and* 1-297 for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres.” (Emphasis added). Since water right 1-297 was not recommended with a “recharge for irrigation” use, a question of fact remains as to why this remark includes water right 1-297. Indeed, water right 1-297 cannot be diverted for a purpose of use that is not stated on the face of the water right. A remark on a separate water right cannot “bootstrap” a new use into water right 1-297.

² Counsel for the Objectors and ASCC have discussed this remark and potential resolution of the objection. It is the Objectors’ position that the remark is unnecessary in the event the Objectors’ motion is granted.

The Objectors filed objections to the “place of use”³ and “remarks” on water right 1-297.

The remark in question (the “procedure remark”) provides that:

The delivery of water to this right may be subject to procedures described in the United States Bureau of Reclamation space holder contracts and the *Burley Irrigation Dist. v. Eagle*, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and *Aberdeen-Springfield Canal Co. v. Eagle*, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969) together with the natural-flow and storage deliveries as calculated by the Idaho Department of Water Resources

A similar procedure remark was included on several water right recommendations in Basin 01, including on water rights held by the Objectors. The Objectors and other claimants have filed objections to this procedure remark on their own water rights as well as other water rights, including water right 1-297. Counsel for the Objectors and other claimants (including ASCC) have variously discussed seeking the designation of the use of the procedure remark as a Basin-Wide issue. Objections were filed to ASCC’s water right 1-297 because this right was one of the first recommendations to include this procedure remark and was set for trial before any of the other recommendations in the basin.. Objectors were concerned that a decision in these subcases might impair their objections on their own water rights. The Objectors expect to continue discussions with ASCC about this remark to determine if a Basin-Wide issue is necessary or if the matter can be heard in conjunction with other recommendations in the basin that have the same procedure remark.

Furthermore, questions of fact are raised by the procedure remark. For example, the procedure remark states that certain procedures “may” be imposed but fails to provide any guidance as to when or how those procedures “may” be applied. The remark fails to even

³ Counsel for the Objectors has spoken with counsel for ASCC regarding the place of use objection. Since the discrepancy as to the number of irrigated acres and the place of use between the first recommendation and the amended recommendation has been clarified by ASCC’s counsel, a resolution of this objection has been reached. As such, the Objectors will not address the place of use objection in this response. Consequently, the objections to water rights 35-2543 and 35-4246 have been resolved as well. See *infra*, n.1.

describe which procedures would potentially be applied. Accordingly, summary judgment is not appropriate on this remark, particularly since it is included on other water right recommendations throughout the Basin.

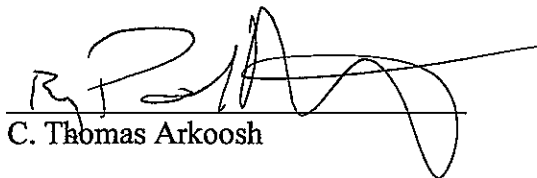
CONCLUSION

ASCC's motion should be denied. The "recharge for irrigation" use on water right 1-23B is not authorized, as a matter of law. *See Objectors' Motion for Summary Judgment.*

Furthermore, the procedure remark has been included on several Basin 01 water rights and is subject to numerous objections by various claimants. The use of the procedure remark on water right 1-297 should be resolved with the other similar objections. Accordingly, ASCC's motion should be denied.

DATED this 16th day of April, 2009.

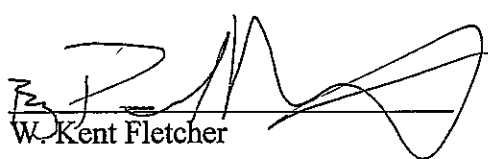
CAPITOL LAW GROUP, PLLC



C. Thomas Arkoosh

*Attorneys for American Falls Reservoir
District #2*

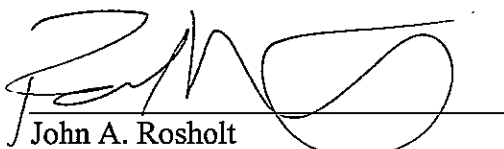
FLETCHER LAW OFFICE



W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

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

CERTIFICATE OF MAILING

I certify that on April 13, 2009, I mailed the original and copies of the foregoing notice to the following persons:

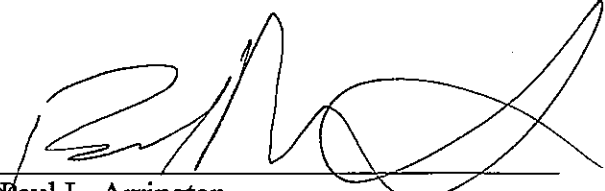
Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Randy Budge
T.J. Budge
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

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


Paul L. Arrington