

APR 20 2009  
DEPARTMENT OF  
WATER RESOURCES

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April 16, 2009

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

Overnight Mail

Re: Case No. 39576, Subcase Nos. 01-23B  
Claimant: Aberdeen-Springfield Canal Company  
Objectors: Twin Falls Canal Company, A&B Irrigation Co., North Side  
Canal Company, Burley Irrigation District, Milner Irrigation  
District and Minidoka Irrigation District

Dear Clerk:

Enclosed please find the following which we are submitting for filing in the above-referenced subcase on behalf of Claimant Aberdeen-Springfield Canal Company:

1. Answering Brief of Claimant;
2. Second Affidavit of Steven T. Howser;
3. Certificate of Service.

Thank you for your assistance. If you have any questions, please contact me or my assistant Robin Roebuck.

Sincerely,

RANDALL C. BUDGE

RCB:rr

Enclosures

cc: Service List (Email and/or U.S. Mail)

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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for Aberdeen-Springfield 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. 01-23B

**ANSWERING BRIEF OF CLAIMANT**

COMES NOW Claimant Aberdeen-Springfield Canal Company ("Claimant" or "ASCC"), by and through counsel of record, and pursuant to I.R.C.P. Rule 56(C) submits this Answering Brief supported by the Second Affidavit of Steven T. Howser filed herewith in response to Objectors' Motion for Summary Judgment dated March 27, 2009, scheduled for oral argument on April 30, 2009. Objectors A&B Irrigation District, American Falls Reservoir District No. 2, 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, will be collectively referred to herein as "Surface Water Coalition" or "Objectors".

## INTRODUCTION

The Surface Water Coalition's Joint Motion for Summary Judgment presents a singular issue challenging the Director's Report Recommendation and asserting that "recharge for irrigation" is incorrectly reflected as a purpose of use element for ASCC's Water Right No. 1-23B. In sum, the basis for Objectors' position is that when Water Right No. 01-23B was decreed in the 1910 Rexburg Decree<sup>1</sup> and subsequently reaffirmed in the 1969 Eagle Decree<sup>2</sup>, the purpose of use was described as "irrigation . . . and for domestic and other purposes," which now somehow precludes the addition of "recharge for irrigation" as an element. ASCC submits that the Surface Water Coalition position is misguided and without supporting legal authority. ASCC submits that "recharge for irrigation" was properly recommended as a purpose of use in the Director's Report as an "accomplished transfer" pursuant to Idaho Code §42-1425, the controlling and conclusive authority. ASCC does concur that this issue is properly submitted for determination on summary judgment as a matter of law.

## BACKGROUND

ASCC's Water Right No. 01-23B was originally decreed in the 1910 Rexburg Decree for "irrigation" and "for domestic and other purposes". *Rexburg Decree, Findings of Fact at 151. See Exhibit A to Thompson Aff.* At the time of the Decree recharge was not an enumerated beneficial use under the Idaho Constitution. *Constitution of the State of Idaho, Article 15, Section 3.* Recharge subsequently became a recognized beneficial use upon the enactment of Idaho Code §42-4201 in 1978. (Addition from tape: In 1980 the Legislature declared recharge

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<sup>1</sup> *The Decree, Rexburg Irrigation Company, et al. v. Teton Irrigation Company, et al*, Decree entered December 19, 1910 ("Rexburg Decree")

<sup>2</sup> *Aberdeen-Springfield Canal Company, et al. v. Henry Eagle*, Decree entered March 12, 1969 ("Eagle Decree").

to be a beneficial use by enacting I.C. §42-1401, which provides:

“The Legislature hereby declares that the appropriation and underground storage of water . . . shall constitute a beneficial use . . .”.

ASCC's original Notice of Claim for Water Right 01-23B was claimed in the SRBA Court on May 8, 1990. *See Exhibit D to Thompson Aff.* Thereafter ASCC objected to over 100 Recommendations for ground water rights in Basin 35 (Consolidated Subcase No. 35-2315) asserting, among other things, that the source of supply for these ground water rights was in fact water owned by ASCC. Accordingly, the issues in Consolidated Subcase No. 35-2315 related to ASCC's surface water rights, Water Right No. 1-23B and 1-297. Following extensive negotiations, ASCC, IDWR and the State of Idaho entered into a *Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315* on June 7, 2002 (hereinafter "Settlement Agreement"), copy of which is attached to the Thompson Affidavit as Exhibit E. The Settlement Agreement addressed and resolved ASCC's objections to the ground water rights of the Consolidated Subcase No. 35-2315, together with the future recommendations of the Department to the SRBA Court with respect to ASCC's surface water rights. The key terms of the Settlement Agreement are:

- The Director's Report for Basin 01 for ASCC's surface water rights will include both land irrigated with surface water as of 1987, as well as lands originally irrigated with surface water but irrigated solely by ground water as of 1987, including the acreage of each. ¶2A
- The Director's Report for the Basin 01 surface water rights would recommend "recharge for irrigation" as a purpose of use under the "accomplished transfer" provisions of Idaho Code §42-1425. ¶2B
- The Director's Report would recommend the place of use be divided into two parts: (1) acreage irrigated directly by surface water (including acreage with supplemental ground water irrigation) as of 1987; and (2) the acreage originally irrigated by surface water for

which authorization to divert surface water for direct irrigation continues with the additional purpose of use “recharge for irrigation” added as an accomplished transfer. ¶2C

- The Director’s Report would recommend the maximum quantity of water diverted and used for the combined use of “irrigation” and “irrigation for recharge” as of 1987, with the calculation intended to maximize the acreage authorized for direct surface water irrigation while fixing the maximum quantity of surface water that can be used for “recharge for irrigation” as an “accomplished transfer”. ¶2D
- Existing ground water rights used for irrigation within the ASCC service area on lands paying assessments to which the surface water rights have remained appurtenant will be given mitigation credit for the amount of water recharged against ground water depletions arising from the diversion of ground water. Mitigation credits would accrue in a given year without carryover. ¶2E
- Once IDWR has filed its Recommendation for ASCC’s Basin 01 water rights, ASCC will withdraw all objections associated with Consolidated Subcase No. 35-2315. ¶3B

Consistent with the Settlement Agreement, Director’s Reports were filed in 2005, 2006 and 2007, each reflecting “recharge for irrigation” as a purpose of use, along with a maximum number of acres for this purpose, as well as for irrigation purposes. None of these Recommendations were objected to by the Surface Water Coalition. “Place of use” objections were filed by ASCC as to the total number of acres in the place of use, and also by the State of Idaho Department of Lands (“IDOL”) and BLM, each asserting some of their own lands were incorrectly included in the place of use identified by the shape file maps. After these place of use objections were resolved and at the request of the Department, ASCC filed an Amended Claim on June 21, 2007 to identify more acres than were originally claimed based on updated and more accurate mapping information. This gave rise to an Amended Director’s Report issued March 21, 2008, on all four ASCC subcases. The Amended Director’s Report resolved all place of use objections. No change was recommended to any other water right elements from the prior Recommendations. Based

upon this Amended Director's Report, the Surface Water Coalition filed objections on April 28, 2008 challenging for the first time the "recharge for irrigation" purpose. The State of Idaho responded to these objections.

There are no other objections to Water Right No. 1-23B. If the recommended purpose of "recharge for irrigation" is allowed and the Surface Water Coalition's objection rejected, Water Right No. 01-23B and all other water rights of ASCC should be partially decreed as recommended. Thereupon, ASCC will withdraw all objections associated with the Consolidated Subcase No. 35-2315, which rights may also be partially decreed, pursuant to Settlement Agreement.

It is noteworthy that the Surface Water Coalition has not alleged that the addition of "recharge" as a purpose of use for Water Right No. 01-23B would result in any injury to their water rights nor result in an enlargement of ASCC rights, nor presented any facts that would support such a claim.

#### **ISSUE**

Only one issue is presented for decision on summary judgment, to-wit:

**Should ASCC's Water Right No. 1-23B be partially decreed to include "recharge for irrigation" as a purpose of use element as recommended in the Director's Report?**

## ARGUMENT

### **A. THE DIRECTOR'S REPORT CONSTITUTES *PRIMA FACIE* EVIDENCE OF THE WATER RIGHT.**

The Director's Report constitutes *prima facie* of the water right. I.C. §42-1411(4). When a party relies on the Director's Report, that party is relieved from offering any facts in support of the summary judgment motion. Giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *State v. Hagerman Water Right Owners* (24 Hagerman Subcases), 130 Idaho 736, 746, 947 P.2d 409 (1997). On summary judgment, the party opposing any element in the Director's Report has the burden of raising an issue of material fact in order to defeat summary judgment. I.C. §42-1411(5). Presumptions may support either the moving or non-moving party on summary judgment. *See, e.g., Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *In the Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

Based upon the foregoing, the Director's Report constitutes *prima facie* evidence of the "recharge for irrigation" element. The basis for this recommendation is set forth in the Settlement Agreement, together with the Second Affidavit of Steven T. Howser establishing, as a matter of fact, that ASCC's Water Right No. 01-23B provides recharge for irrigation through the Company's canals and delivery systems which is the source of supply for the ground water rights of the Company and its shareholders within the Company's place of use for irrigation of lands covered by shares of the Company whose claims are pending in Consolidated Subcase No. 35-2315. *Second Affidavit of S. Howser*, ¶ 4, 5, 8, 9, 10.

**B. APPLICATION OF IDAHO CODE §42-1425 ACCOMPLISHED TRANSFERS PROVISIONS.**

In 1985 the Legislature enacted various statutes relating to the Snake River Basin Adjudication ("SRBA"), which are collectively referred to as the "Amnesty Statutes". I.C. §§ 42-1425, 42-1426 and 42-1427 (Supp. 1995). The amnesty statutes, including Idaho Code §42-1425 "accomplished transfers" have been held constitutional by the Supreme Court of Idaho. *In Re SRBA Case No. 39576; Madison-Fremont Irrigation District & Mitigation Group, et al. vs. Idaho Ground Water Appropriators, Inc., and the State of Idaho, et al.*, 129 Idaho 454, 926 P.2d 1301 (1996).

The "accomplished transfers" provisions set forth in I.C. §42-1425 conclusively establish the authority as well as the obligation to add "irrigation for recharge" as a purpose of use in addition to irrigation. An "accomplished transfer" is defined as a change in nature or purpose of use which took place in violation of I.C. §42-222, the mandatory transfer statute. I.C. §42-1425(2) provides in pertinent part:

"Any change of . . . purpose of use . . . by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the Court or under the provisions of the Constitution and statutes of this state prior to November 19, 1987, the date of commencement of the Snake River Basin Adjudication . . . may be claimed in the applicable general adjudication even though the person has not complied with Sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right." (Emphasis added.)

Here, the facts are clear and undisputed that the change in the purpose of use of Water Right No. 01-23B to include recharge occurred after this water right was originally decreed in the 1910 Rexburg Decree, yet long before the November 19, 1987 commencement of the Snake River Basin Adjudication. *Second Aff. Of S. Howser*, ¶¶ 7, 8, 9. Furthermore, the I.C. §42-

1425(2) requirements are met since no other water rights existing on the date of the change could be injured and there is no enlargement of the original right as a matter of law because the recharge water is delivered to the same lands to which Water Right 01-23B is appurtenant and covered by shares of ASCC. *Second Aff. Of S. Howser*, ¶¶ 7, 8, 9, 10.

Based upon the information before the Court, the Director properly complied with his mandatory duty under I.C. §42-1425 by recommending “recharge for irrigation” as a purpose of use as an accomplished transfer. The accomplished transfer comports with the legislative finding and declaration that “the continuation of the historic water use patterns resulting from these changes is in the local public interest.” I.C. §14-1425(1).

It is undisputed that the delivery of recharge for irrigation under ASCC’s Right No. 01-23B occurred long before November 19, 1987. ASCC’s ground water Right Nos. 35-4246 and 35-02543 were licensed with priority dates of 10/15/1934 and 8/7/1958, respectively and have been used continuously from dates preceding these priority dates. *Second Aff. Of Steve Howser*, ¶10. Additionally, all of the wells of the Company’s shareholders in Consolidated Subcase No. 35-2315 were licensed with priority dates prior to 1987 as evidenced by the records of the Department, thus qualifying them as accomplished transfers as a matter of law. All of these wells and ground water claims have as their source of supply for irrigation water recharge ground water under ASCC’s Water Right 01-23B, with irrigation on the same lands covered by shares to which this water right is appurtenant. *Second Aff. Of S. Howser*, ¶ 10. Accordingly, based upon these facts and pursuant to the accomplished transfers statute, the Director not only had a right, but an obligation, to recommend “recharge for irrigation” as a purpose of use in addition to irrigation.

The Surface Water Coalition contends that ASCC is bound by its prior Decrees as to the

purpose of use for Water Right No. 01-23B and thereby concludes that “recharge for irrigation” cannot be added as a purpose since it was not included in the Eagle or Rexburg Decrees. *Memorandum in Support of Joint Motion for Summary Judgment* at pp. 5, 6. This argument is entirely without merit and totally ignores the very purpose and clear and unambiguous language of the accomplished transfer statute. The Surface Water Coalition presents no authority whatsoever to support their argument that the accomplished transfer statute should be ignored, quite obviously because no such authority exists.

The Surface Water Coalition also implies that ASCC’s amended claim is somehow deficient because it did not add “recharge for irrigation” as an additional purpose. ASCC never objected to any of the water right elements set forth in the various Director’s Reports in 2005, 2006, 2007 and 2008, each of which included “recharge for irrigation” as an additional purpose. As discussed above, ASCC’s objection was only to the number of irrigated acres, which was the focus of its Amended Claim. Any argument made by the Surface Water Coalition that ASCC’s Amended Claim is somehow deficient or precludes the recommendation of “recharge for irrigation” is without supporting authority and ignores the facts and law. If such an argument had any merit, then the Surface Water Coalition’s own objections should be deemed untimely and waived. This would be based upon the fact that the Surface Water Coalition did not object to the “recharge for irrigation” purpose in the 2005, 2006 or 2007 Director’s Reports, only the Amended 2008 Director’s Report which was issued for the sole purpose of resolving the place of use objections by ASCC, IDOL and BLM.

### **CONCLUSION**

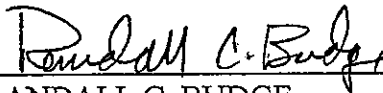
The prior Decrees establishing ASCC’s Water Right No. 01-23B which establish “irrigation” and “other purposes” as the purpose of use do not preclude the addition of “recharge for

irrigation” as an additional purpose as a matter of law. The additional purpose of “recharge for irrigation” was properly recommended in the Director’s Report as an “accomplished transfer” pursuant to I.C. §42-1425, the controlling and conclusive authority. As there are no material issues of fact in dispute, ASCC is entitled to summary judgment. Partial Decrees should be entered on all ASCC water right claims as recommended in the Director’s Report as a matter of law.

RESPECTFULLY SUBMITTED,

DATED this 16<sup>th</sup> day of April, 2009.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

  
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RANDALL C. BUDGE