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LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY DEPARTMENT OF
CHARTERED WATER RESOURCES

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
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JOSHUA D. JOHNSON
JONATHAN S. BYINGTON
DAVE BAGLEY
CAROL TIPPI VOLYN
THOMAS J. BUDGE
CANDICE M. MCHUGH
JONATHAN M. VOLYN

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

BOISE OFFICE
101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE
477 SHoup AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

COEUR D'ALENE OFFICE
250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

April 23, 2009

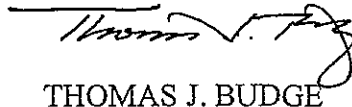
Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Re: Subcase Nos. 01-23B, 01-297, 35-2543, 35-4246
Aberdeen-Springfield Canal Company
Summary Judgment Reply Brief

Dear Clerk:

Enclosed please find a Summary Judgment Reply Brief. Should you have any questions or concerns regarding this matter, please do not hesitate to contact our office. Thank you for your assistance.

Sincerely,



THOMAS J. BUDGE

TJB:sf
Enclosures

Randall C. Budge, ISB No. 1949
Thomas J. Budge, ISB No. 7465
**RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED**
P.O. Box 1391; 21 E. Center Street
Pocatello, Idaho 83204-1391
208-232-611 - Telephone
208-232-6109 - Fax

Attorneys for Aberdeen-Springfield Canal Company

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DEPARTMENT OF
WATER RESOURCES

**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. 1-23B, 1-297, 35-2543, 35-4246

**CLAIMANT'S SUMMARY
JUDGMENT REPLY BRIEF**

The Claimant, Aberdeen-Springfield Canal Company ("ASCC"), through counsel of record and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, respectfully submits this brief in reply to the *Objectors' Response to Claimant's Motion for Summary Judgment*.

ARGUMENT

I. ALL OBJECTIONS TO WATER RIGHTS 1-23B, 1-297, 35-2543 AND 35-4246 SHOULD BE RESOLVED BY SUMMARY JUDGMENT.

The Court's *Order Denying Motions* dated April 14, 2009, expresses "concern with what will be the purpose of the summary judgment hearing and what will be asked of the Court," and asks the parties to "submit additional filings to clarify the posture of the four subcases well in advance of the summary judgment hearing." (Order Denying Motions at 2.) In ASCC's view, the Court can and should render summary judgment in ASCC's favor on all of the objections filed against water rights 1-23B, 1-297, 35-2543 and 35-4246.

ASCC moved for summary judgment on all elements of water rights 1-23B, 1-297, 35-2543 and 35-4246, asking that "each of Claimant's Water Right Claims be partially decreed as recommended in the Director's Report." (Memorandum in Support of Claimant's Motion for Summary Judgment and Other Motions at 8.) The Objectors¹ moved for summary judgment only on the "purpose of use" element of water right 1-23B, asserting that the "recharge for irrigation" purpose of use "should be dismissed as a matter of law." (Objectors' Joint Motion for Summary Judgment at 2.) Thus, the Court may rule on summary judgment in favor of ASCC on all of the elements of the subject water rights, but may rule in favor of the Objectors only on the "purpose of use" element of water right 1-23B.

As explained below, there are no genuine issues of material fact before this Court with respect to any of the objections to water rights 1-23B, 1-297, 35-2543 and 35-4246. Accordingly, summary judgment should be rendered as a matter of law on all elements of the water rights.

II. THE OBJECTORS HAVE NOT COME FORWARD WITH EVIDENCE THAT SHOWS ANY GENUINE ISSUES OF MATERIAL FACT, AND ASCC IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Objectors ask this Court to deny ASCC's motion for summary judgment on the basis that the Objectors will at some future time show that a genuine issue of material fact exists. They argue that "should the Special Master deny the Objector's motion, *then* several issues of fact will be presented." (Objector's Response to Claimant's Motion for Summary Judgment at 3; emphasis added.) In the Objectors' view, they have no obligation to "put on facts before trial," even though ASCC has moved for summary judgment with supporting affidavits. *Id.*

Under Idaho's well-established law and procedures governing summary judgment, the

¹ Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, A&B Irrigation District, Burley Irrigation District, Minidoka Irrigation District and American Falls Reservoir District No. 2 (collectively the "Objectors") all filed identical objections to water right numbers 1-23B, 1-297, 35-2543 and 35-4246. As an exception, Minidoka Irrigation District has not objected to water right numbers 35-2543 and 35-4246.

Objectors are not free to avoid summary judgment by withholding until trial the evidence necessary to show the existence of a genuine issue of material fact. Rather, once the party moving for summary judgment establishes its *prima facie* case, "the burden shifts to the non-moving party to make a showing of a genuine issue of material fact on the elements challenged by the moving party." *Navarrette v. City of Caldwell*, 130 Idaho 849, 851 (1997). The non-moving party is not entitled to sit back and wait for trial, "but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact." *Zehm v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 350 (1988) (emphasis added). Indeed, "[m]otions for summary judgment are decided upon facts shown, not upon facts that might have been shown." *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337 (Ct. App. 1984). Thus, the Objectors cannot avoid summary judgment by claiming that genuine issues of material fact will be revealed at trial.

ASCC asserts that there are no genuine issues of material fact, and has created a record that establishes by *prima facie* evidence the absence of a genuine issue of material fact. By statute, "the director's report ... shall constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law." Idaho Code § 42-1411. In addition, ASCC filed affidavits of Steven Howser, manager of ASCC, and Anthony Olenichak, Senior Water Right Agent for the Idaho Department of Water Resources ("IDWR" or "Department"), which further support the recommended priority date, purpose of use, place of use, and remarks for water right numbers 1-23B, 1-297, 35-2543 and 35-4246. The State of Idaho also submitted affidavits of Karl Dreher, Michael Holliday, and David Barber which also support the recommended elements of the subject water rights as contained in the Director's Report.

The Director's Report, together with the evidence submitted by affidavit, soundly establish the facts necessary for this Court to issue partial decrees for water right numbers 1-23B, 1-295, 35-2543 and 35-4246, causing the burden to shift to the Objectors to come forward with specific facts that (1) contradict the evidence submitted by ASCC and the State, and (2) establish the existence of a material issue of disputed fact. *Zehm*, 116 Idaho at 350. The Objectors "may not rest upon the mere allegations or denials of [their SF-1 Objections]," but "must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. 56(e). Further, the Objectors' allegations of disputed fact "must be anchored in something more than speculation." *Nelson v. Steer*, 118 Idaho 409 (1990). "Flimsy or transparent contentions" and "theoretical questions of fact" are inadequate. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871 (1969). Only material facts that "are actually and in good faith controverted" warrant denial of a motion for summary judgment. Idaho R. Civ. P. 56(d).

A. Water Rights 35-2543 and 35-4246.

The Objectors objected to the "place of use" and "remarks" elements of water right numbers 35-2543 and 35-4246. However, the Objectors did nothing more than "check the box" on their Standard Form 1 Objections. They failed to indicate what the place of use and remarks should be or otherwise explain what error they believe to exist in the director's report. Merely checking the box, however, is not enough to create a genuine issue of material fact. Idaho R. Civ. P. 56(e).

Despite the Objectors' obligation to come forward with evidence that contradicts the recommended "place of use" and "remarks" for water rights 35-2543 and 35-4246, they have offered nothing. Nor have the Objectors made any legal challenges to these water rights. In fact, there is no reference at all to water right numbers 35-2543 or 35-4246 in the *Objectors' Response*

to Claimant's Motion for Summary Judgment. It appears the Objectors' objections water rights 35-2543 and 35-4246 were made without any reasonable basis in law or fact. Accordingly, summary judgment should be awarded in favor of ASCC decreeing all elements of water rights 35-2543 and 35-4246 consistent with the Director's Report.

B. Water Right 1-297.

The Objectors objected to the "place of use" and "remarks" elements of water right 1-297. Again, the Objectors merely checked the box on their Standard Form 1 Objection without indicating what the place of use or remarks should be or otherwise supporting the objections. As with water rights 35-2543 and 35-4246, the Objectors have made no argument and offered no evidence contesting the recommended the place of use of water right 1-297, which should therefore be decreed as recommended.

The Objectors' objection to the "remarks" to water right 1-297 concerns only the first remark, which states:

The delivery of water to this water 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.

(Objectors' Response to Claimant's Motion for Summary Judgment at 5.) The Objectors make three arguments concerning this remark. First, they argue that this Court cannot rule on this remark because the Objectors have objected to a similar remark included on other water right recommendations. *Id.* Second, the Objectors argue that this Court cannot rule on this remark because the Objectors' may in the future seek to have a basin-wise issue designated that affects this remark. *Id.* Third, the Objectors' claim that questions of fact are raised by this remark because

"the remark states that certain procedures 'may' be imposed but fails to provide any guidance as to when or how those procedures 'may' be applied." *Id.*

None of the Objectors' concerns raise genuine issues of material fact. First, the fact that the Objectors have objected to a similar remark on another water right does not create an issue of fact for trial in the adjudication of water right 1-297. Second, the Objectors' interest in seeking a basin-wide issue likewise fails to create a genuine issue of material fact. Third, the Objectors' claim that the remark lacks guidance as to how the decrees "may be applied" also fails to create a genuine issue of material fact. The question of how the Director *applies* the decrees is not ripe for review in this adjudication, but must first be tried in an administrative proceeding before the Department under the Idaho Administrative Procedures Act. It is not necessary for this Court to undertake to delineate the innumerable ways in which remarks may be applied. For the purposes of adjudication, it is only necessary that the Court confirm that water right 1-297 is subject to the decrees that are identified in the remark, to which both ASCC and the Objectors are in agreement.

In sum, the Objectors' arguments concerning water right 1-297 pertain to administrative matters that are not properly before this Court. The Objectors have not explained the basis for their objections or come forward with evidence that shows a genuine issue of material fact for trial. Whatever curiosities the Objectors may have concerning the application of the identified decrees, their arguments do not rise above speculative contentions and theoretical questions. Therefore, summary judgment is appropriate to decree water right 1-297 consistent with the director's report.

C. Water Right 1-23B.

The Objectors filed objections to the "priority date," "purpose of use," "place of use," and "remarks" elements of water right 1-23B. They have neither argued nor submitted evidence to show that the priority date should be different, or that the place of use should include more, fewer,

or different acres. Therefore, the priority date and place of use for water right 1-23B should be decreed consistent with the director's report.

As to the purpose of use and remarks, the Objectors take issue with (1) a remark that was contained in the original director's report but not in the amended director's report, (2) the purpose of use for "recharge for irrigation," and (3) the Settlement Agreement remark. As set forth below, there are no genuine issues of material fact and ASCC is entitled to judgment as a matter of law as to each objection.

First, the Objectors take issue with "[t]he remark that 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.'" (Objectors' Response to Claimant's Motion for Summary Judgment at 4; emphasis in original.) The Objectors argue that "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." *Id.* However, the Objectors' argument appears to be due on a mistake, since the remark they reference is not contained in the amended director's report filed on March 25, 2008. The amended report for water right 1-23B states only that "Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres." (emphasis added.) There is no indication in the amended director's report that water is diverted for recharge for irrigation under water right 1-297. Therefore, this remark should be resolved on summary judgment and decreed consistent with the amended director's report.

Second, the Objectors dispute the recommended purpose of use of "recharge for irrigation," but only on legal grounds. (Objectors' Resp. to Claimant's Mot. for Summ. J. at 3.) The Objectors have not argued or come forward with evidence to show that ASCC has not in fact utilized water for recharge for irrigation or to show that the Objectors' water rights are injured or

that an enlargement occurred from the accomplished transfer. In fact, the Objectors agree that "there are no genuine issues of material fact as to the 'recharge for irrigation' purpose of use element" (Objector's Joint Mot. for Summ. J. at 2.)

The Objectors argue that "ASCC could not have legally used its water for 'recharge' ... at any time prior to 1978," and that the recommended purpose of use for "recharge for irrigation" "cannot stand, as a matter of law." (Objectors' Resp. to Claimant's Mot. for Summ. J. at 3.) Importantly, the Objectors have not disputed ASCC's actual use of water for recharge for irrigation or ASCC's compliance with the three requirements of the enlargement statute, Idaho Code § 42-1425; namely, that (1) the change took place prior to November 19, 1987; (2) the change does not injure other water rights existing on the date of the change; and (3) the change did not result in the enlargement. Rather, they argue that even though ASCC complied with the accomplished transfer statute, this Court is still barred by law from recognizing an accomplished transfer for "recharge for irrigation." *Id.*

In reply, ASCC incorporates herein by reference the arguments contained in the *Answering Brief of Claimant* and the *State of Idaho's Brief in Response to Claimant's Motion for Summary Judgment and Objectors' Motion for Summary Judgment*, which soundly rebuff the Objectors' position on this point.

Finally, the Objectors claim that the different verbiage between the original director's report and the amended director's report concerning a settlement agreement "raises an issue of fact considering the implementation and effect of the Agreement." (Objectors' Resp. to Claimant's Mot. for Summ. J. at 4.) The Objectors do not argue that water right 1-23B is not subject to the agreement or that the remark in question should be worded differently. Nor do the Objectors identify what issue of fact they believe is raised by the issuance of an amended Director's Report.

The Objectors appear to argue that the amendment of the Director's Report creates a genuine issue of material fact *per se*, as if the original report and the amended report are in competition with each other. However, the amended director's report supersedes the original director's report, and only the amended director's report now constitutes *prima facie* evidence of the water right. Once amended, the prior director's report contains no probative value. Thus, the bare submission of a defunct Director's Report, however, does not create a genuine issue of material fact.

Further, the Objectors have not taken issue with inclusion of the settlement agreement remark in the partial decree for water right 1-23B, but argue that it is the "implementation and effect of the Agreement" that is problematic. *Id.* at 4 (emphasis added). Much of the agreement concerns the Department's recommendation of water right 1-23B which has occurred in this proceeding. If the Objectors disagree with the Department's recommendations, they have been free to come forward with evidence to show where the Department erred. However, as to the provisions in the agreement that affect the administration of water right 1-23B, they are not ripe for review in this proceeding, but must first proceed through an administrative hearing before the Department if and when a challenge is made to the manner in which the agreement is implemented. Thus, with no genuine issues of material fact on record before this Court, the settlement remark should be resolved on summary judgment consistent with the director's report.

CONCLUSION

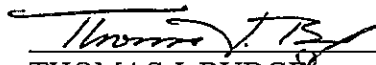
Whatever curiosities the Objectors may have concerning ASCC's water rights 1-23B, 1-297, 35-2543 and 35-4246, they have not come forward with evidence that contradicts the director's report and creates a genuine issue of material fact for trial. Nor have the Objectors' raised legal objections to water rights 1-297, 35-2543 and 35-4246, which should therefore all be

resolved on summary judgment consistent with the director's report. The only issue before this Court pertains to the legal question of whether the water right 1-23B should be partially decreed to include the "recharge for irrigation" as a purpose of use as recommended in the director's report. The record in this case is undisputed that recharge is a beneficial use of water and that ASCC has complied with the accomplished transfer requirements of Idaho Code § 42-1425. Therefore, water right 1-23B should also be resolved on summary judgment consistent with the director's report.

RESPECTFULLY SUBMITTED.

DATED this 23rd day of April, 2009.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED


THOMAS J. BUDGE
Attorney for Claimant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this ~~5th~~²³ day of ~~March~~^{April}, 2009, I caused to be served the original and copies of the foregoing document to the following persons by the indicated methods:

Original to:	Clerk of the District Court Snake River Basin Adjudication P.O. Box 2707 253 Third Avenue North Twin Falls, Idaho 83303-2707	U.S. Mail and Fax
Copy to the Claimant:		
	Aberdeen-Springfield Canal Company P.O. Box 857 Aberdeen, Idaho 83210	U.S. Mail and Email
Copy to each of the parties and their attorneys:		
	John K. Simpson/Travis L. Thompson Barker Rosholt & Simpson LLP P.O. Box 485 Twin Falls, Idaho 83303-0485	U.S. Mail and Email
	Twin Falls Canal Company P.O. Box 326 Twin Falls, Idaho 83303-0326	U.S. Mail
	A&B Irrigation District P.O. Box 675 Rupert, Idaho 83350-0675	U.S. Mail
	North Side Canal Company 921 N. Lincoln Avenue Jerome, Idaho 83338	U.S. Mail
	Burley Irrigation District 246 E. 100 S. Burley, Idaho 83318	U.S. Mail
	Milner Irrigation District 5294 E. 3610 N. Murtaugh, Idaho 83344	U.S. Mail
	W. Kent Fletcher Attorney at Law	U.S. Mail & Email

P.O. Box 248
Burley, Idaho 83318

Minidoka Irrigation District
98 W. 50 S.
Rupert, Idaho 83350

U.S. Mail

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

U.S. Mail

United States Department of Justice
Environment and Natural Resource Div.
550 W. Fort Street, MSC 033
Boise, Idaho 83724

U.S. Mail

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

U.S. Mail

A handwritten signature in black ink, appearing to read "Thomas J. Tschida", is written over a horizontal line.