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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, and 35-4246**

)
) **OBJECTORS' RESPONSE TO**
) **ABERDEEN-SPRINGFIELD**
) **CANAL COMPANY'S MOTION**
) **FOR SUMMARY JUDGMENT**
) **AND REQUEST PURSUANT TO**
) **RULE 56(f) TO ALLOW**
) **DEPOSITIONS TO PROCEED**
) **BEFORE HEARING**
)

**OBJECTORS' RESPONSE TO ASCC'S MOTION
FOR SUMMARY JUDGMENT AND RULE 56(f) REQUEST**

COME 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, Objectors in the above-referenced subcases, by and through counsel of record, and pursuant to Idaho Rule of Civil Procedure 56(f) hereby jointly file this response to Aberdeen-Springfield Canal Company's *Motion for Summary Judgment* and if Objectors' Motion for Summary Judgment is denied, request an opportunity to conduct depositions before a hearing on this motion is held. This request is filed due to the alleged facts provided in the affidavits accompanying the State of Idaho's *Brief in Response to Claimant's Motion for Summary Judgment* and ASCC's *Answering Brief* filed in this proceeding on April 16, 2009.

ARGUMENT

I. IF THE OBJECTORS' MOTION FOR SUMMARY JUDGMENT IS DENIED, THE AFFIDAVITS SUBMITTED BY THE STATE OF IDAHO AND ASCC REQUIRE DEPOSITIONS THAT ARE NECESSARY FOR THE OBJECTORS' OPPOSITION TO THE ASCC MOTION.

The Respondent State of Idaho ("State") filed a brief in response to ASCC's motion for summary judgment, along with supporting affidavits. Although styled a "response", the State's brief is more akin to a memorandum "in support" of ASCC's motion, and as such the affidavits submitted by the State allege facts that require deposition of the affiants so that the Objectors will have an opportunity to respond and oppose ASCC's motion.

Notably, the State submitted the *Affidavit of Karl J. Dreher*. See *Idaho Exhibit 1*. Mr. Dreher is the former Director of the Idaho Department of Water Resources and was the person who signed the *Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315* and made findings relative to the alleged accomplished transfer of the purpose of use of ASCC's water right 1-23B.

See Dreher Aff. at 2. Mr. Dreher's affidavit includes several conclusory statements without any supporting foundation, including the following:

4. The agreement was the result of an investigation and negotiations regarding ASCC's water rights claims in the Snake River Basin Adjudication.

5. By signing the settlement, I agreed that IDWR would recommend a portion of ASCC's surface water rights as an accomplished transfer from irrigation to recharge for irrigation.

7. I concluded that the accomplished transfer was justified because ASCC shareholders continued to pay assessments and ASCC diverted the full amount of water authorized under water right number 1-23B in most years. Thus, a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer ("ESPA").

8. The change from irrigation to recharge for irrigation took place prior to November 19, 1987.

9. The accomplished change in purpose of use from irrigation to recharge for irrigation for a portion of ASCC's water rights did not injure other water rights or result in an enlargement because the amount of water ASCC diverted and consumptively used was no more than its historic diversion and consumptive use.

10. Since the change from irrigation to recharge for irrigation took place prior to the commencement of the SRBA on November 19, 1987, and there was no injury and no enlargement, the criteria of the accomplished transfer statute, Idaho Code § 42-1425, were met.

Dreher Aff. at 2-3. *Idaho Exhibit 1.*

It is clear from Mr. Dreher's affidavit that IDWR recommended an accomplished transfer for ASCC's water right 1-23B as a result of the 2002 *Settlement Agreement* with ASCC.

However, it is not clear what basis Mr. Dreher had to conclude that the accomplished transfer from "irrigation" to "recharge for irrigation": 1) was justified; 2) took place prior to November 19, 1987; and 3) did not result in injury to other water rights or result in an enlargement. There are no facts in the record to support these bare, conclusory statements by Mr. Dreher. In addition

to Mr. Dreher's affidavit, the State also submitted the *Affidavit of Michael Holliday* in support of its brief. Mr. Holliday provides certain factual information derived from the *Settlement Agreement* and that is alleged to be "consistent with IDWR's understanding of the agreement". See *Holliday Aff.* at 2. Since Mr. Holliday's testimony is based upon the agency's "understanding of the agreement", additional facts need to be obtained through deposition to determine the basis for his statements.

Similarly, Steve Howser's (manager of ASCC) second affidavit contains conclusory statements without any supporting information, including the following:

4. . . . As will be described specifically below, the diversion and delivery of water is for the purpose of irrigation and recharge for irrigation. Diversion of Water Right No. 01-23B provides water for surface water irrigation and also for the purpose of recharge for irrigation of a maximum of 17,161.6 acres determined by my calculations based upon review of the Company's records and maps, confirmed by the Department's and set forth in the "Recommended Water Right".

5. . . . and is able to determine therefrom the amount of water that is recharged to ground water underlying the Company's service area. On average the Company recharges to ground water up to 67% of the amount diverted into the canal system. Over the last 20 years the recharge amount ranges between 160,000 AF and 228,000 AF and averages 180,000 AF. This recharge to the ground water underlying the Company's service area has and continues to establish and maintain the supply of ground water which provides recharge for irrigation for the Company's ground water rights and those of the Company's shareholders which have pending claims in Consolidated Subcase No. 35-2315, as further described below.

7. The change in the actual of use of water available under Water Right No. 1-23B to include recharge for irrigation occurred long prior to November 19, 1987, the date of the commencement of the Snake River Basin Adjudication by the Company and shareholders entitled to use water on land covered by Company shares to which the water has been made appurtenant.

8. At all times prior to and after November 1, 1987, the Company has diverted and delivered to the Company's shareholders as needed water available up to the authorized maximum quantity available under Water Right No. 1-23B

consisting of up to 1,172.1 cfs for irrigation purposes and 389.5 cfs for recharge for irrigation. . . .

9. In addition to the delivery of recharge for irrigation to the described Consolidated Subcase 35-2315 claimants, water has been delivered by the Company under Water Right 01-23B to provide irrigation for recharge to the Company's ground Water Right No. 35-4246, licensed with a priority date of 10/15/1934, and Water Right No. 35-02543, licensed with a priority date of 8/7/1958. . . .

10. All of the above-described wells of the Company and of the objected-to claimants in Consolidated Subcase No. 35-2315 have as their source of supply for irrigation water recharged to the ground water under the Company's Water Right No. 1-23B. . . .

Second Affidavit of Steven T. Howser at 2-5.

Mr. Howser makes several conclusory assertions about ASCC's diversion and use of water for "recharge for irrigation" purposes under water right 1-23B. However, the actual claims filed by ASCC with the SRBA Court, and signed under oath by ASCC's president and Mr. Howser, plainly demonstrate that ASCC has never claimed a "recharge for irrigation" purpose of use for water right 1-23B, let alone an accomplished transfer for this water right. *See Exs. D and F to Affidavit of Travis L. Thompson in Support of Objectors' Joint Motion for Summary Judgment.* It is unclear under what statutory authority IDWR can proceed to recommend a purpose of use for a water right in the SRBA that is not claimed by the claimant. Moreover, although the Legislature has specifically stated that "incidental recharge may not be used as the basis for claim or a separate or expanded water right", it appears that IDWR has done just that in this case by recommending a "recharge for irrigation" purpose of use for ASCC's water right claim 1-23B. *See Idaho Code § 42-234(3).* This evidence, at a minimum, creates a genuine issue of material fact precluding summary judgment in favor of ASCC.

Without supporting information or additional facts to verify Mr. Dreher's, Mr. Holliday's, or Mr. Howser's statements, the Objectors are presently unable to present facts to

oppose ASCC's motion. Objectors have filed a Motion to Strike the Affidavits since they do not comply with I.R.C.P. 56(e) and greatly expand on the language of the written Settlement Agreement and the recommended water rights. If the Motion to Strike is denied, the Objectors must depose Mr. Dreher, Mr. Holliday, and Mr. Howser in order to discover the facts behind the conclusory statements made in the Affidavits. A reasoned decision on ASCC's motion can only be made after a full examination of the facts supporting the conclusions made in the affidavits, including all facts regarding the alleged accomplished transfer that apparently occurred sometime prior to November 19, 1987.

Pursuant to I.R.C.P. 56(f), if the Objectors' Motion for Summary Judgment and the Motion to Strike are denied, the Objectors should be allowed an opportunity to take the depositions of Mr. Dreher, Mr. Holliday, and Mr. Howser before responding to the arguments contained in the State's *Brief in Response to Claimant's Motion for Summary Judgment* and ASCC's *Answering Brief of Claimant*. Rule 56(f) provides the following:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

I.R.C.P. 56(f).

The rule allows the Court to grant a party opposing summary judgment the opportunity to take depositions and develop evidence before responding to the motion. *See Doe v. Garcia*, 126 Idaho 1036 (Ct. App. 1995). Although the Objectors have already filed a response to ASCC's motion for summary judgment, the affidavits of Mr. Dreher and Mr. Holliday were not submitted to the Court until the State filed its response brief. Moreover, the second affidavit of Mr. Howser was only submitted with ASCC's answering brief. All of these affidavits were clearly filed in

support of ASCC's motion, and as such the Objectors have not been provided an opportunity to respond to the information contained. Hence, in order to file a sufficient response to ASCC's motion, depositions of the affiants is necessary.

In addition, given these affidavits were only filed last week on April 16, 2009, and the Objectors cannot obtain facts to justify their opposition to ASCC's motion without taking these depositions first, the Court should permit the depositions prior to any hearing on ASCC's motion for summary judgment. Unless the Objectors are provided with a full and fair opportunity to discover the basis for the statements contained in the affidavits through deposition, the Objectors cannot provide an adequate response at this time and will be prejudiced by a hearing and ruling on ASCC's motion. Therefore, the Objectors respectfully request the Court to continue the hearing on ASCC's motion to permit the depositions of Mr. Dreher, Mr. Holliday, and Mr. Howser to be taken so that the Objectors can present facts essential to justify the opposition to ASCC's motion. The conclusory statements of Mr. Dreher and Mr. Howser raise issues of fact surrounding the alleged accomplished transfer and must be further discovered for a complete resolution of this matter.

II. IN THE EVENT THE OBJECTORS' SUMMARY JUDGMENT IS DENIED, THE COURT MUST REMAND THE MATTER TO IDWR FOR FURTHER HEARING ON THE RECOMMENDED "ACCOMPLISHED TRANSFER" OF THE PURPOSE OF USE FOR WATER RIGHT 1-23B.

If the Objectors' motion for summary judgment is denied, it is clear that the proceeding must be remanded to the Director pursuant to Idaho Code § 42-1425(2)(a). Since "objections" have been filed to the recommended accomplished transfer of the "purpose of use" for water right 1-23B, the statute provides that the "district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right". I.C. § 42-1425(2)(a); *see*

also, Special Master Bilyeu's *Order on Summary Judgment* at 5-6 (Subcase No. 29-271 et al., August 18, 2006). Although Mr. Dreher has provided conclusory statements in his affidavit concluding that no injury occurred and that no enlargement of water right 1-23B on the date of the change to "recharge for irrigation", there are no facts in the record to support his statements. Hence, the deposition of Mr. Dreher is required prior to any summary judgment hearing. In the event the summary judgment motions are denied, further hearing on the objections must be held before IDWR.

Although the Objectors submit that granting their motion for summary judgment will resolve this matter (denying the "recharge for irrigation" purpose of use as a matter of law), should the Objectors' motion be denied it is clear that the statute provides the next procedure for the Court to follow to resolve the outstanding objections to the recommended "recharge for irrigation" accomplished transfer.

The Objectors request oral argument on this request.

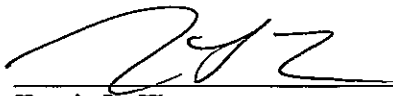
DATED this 23rd day of April, 2009.

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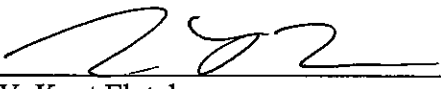
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CERTIFICATE OF MAILING

I certify that on April 23rd, 2009, I mailed the original and copies of the foregoing to the following persons:

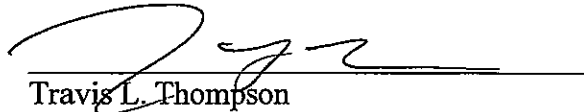
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