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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
)

)
) **OBJECTION TO AND MOTION TO**
) **STRIKE AFFIDAVITS**
)

This Objection to and Motion to Strike Affidavits is filed by Minidoka Irrigation District, A & B
Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation

District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as “Objectors”).

NATURE OF THE OBJECTIONS

Aberdeen-Springfield Canal Company (ASCC) filed *Claimant’s Motion for Summary Judgment* on March 26, 2009. In support of the Motion, ASCC filed several Affidavits including the *Second Affidavit of Steven T. Howser* dated April 15, 2009.

The State of Idaho filed *State of Idaho’s Brief in Response to Claimant’s Motion for Summary Judgment and Objectors’ Motion for Summary Judgment* on April 16, 2009. In support of that response, the State filed several Affidavits including the *Affidavit of Karl J. Dreher* dated April 15, 2009 and the *Affidavit of Michael Holliday* dated April 15, 2009.

Objectors object to contents of the Affidavits on the grounds that they lack foundation, are not admissible in evidence and do not comply with the requirements of I.R.C.P. 56(e).

APPLICABLE RULES AND CASES

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. I.R.C.P. 56(e) (emphasis added)

When reviewing a trial court’s ruling on a summary judgment motion, this court will consider only proof that complies with Rule 56(e), being based upon personal knowledge and containing material that would be admissible at trial. *Cates v. Albertson’s, Inc.*, 126 Idaho 1030, 1033, 895 P.2d 1223, 1227.

Conclusory statements that do not provide the kind of specific, admissible facts that will either

support or prevent the entry of summary judgment do not satisfy either the requirements of admissibility or competency under Rule 56(e). See *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 786, 839 P.2d 1192, 1200 (1992).

ARGUMENT

Karl Dreher's Affidavit

Objectors object to several conclusory comments in Mr. Dreher's affidavit, pp. 2-3, that are made without any supporting foundation and that would be inadmissible in evidence, including the following:

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.

The settlement agreement speaks for itself. This statement offers no probative value. The fact that IDWR would agree to recommend the water rights as an accomplished transfer does not mean that the criteria for an accomplished transfer were met, and reflects that the recommendation was the result of a compromise rather than compliance with statutory requirements.

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").

There is nothing in the record to support the stated conclusion that ASCC shareholders continued to pay assessments, and there is no foundation indicating the shareholders to which Mr. Dreher is referring. Further, there is nothing in the record to support the statement that ASCC diverted "the full amount of water authorized under water right number 1-23B in most years" and there is no

indication of the years to which Mr. Dreher refers. There is nothing in the record supporting the conclusory statement that “a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer (“ESPA”)", and even if true, there is nothing in the law or in the affidavit that would explain how or when” incidental recharge” is converted into “recharge for irrigation”. The Settlement Agreement is an integrated agreement (see paragraph 6 of the Settlement Agreement), is not ambiguous, and the Director and any other person are now barred from attempting to add interpretations or terms to the written integrated agreement. The Settlement Agreement makes no mention of “incidental recharge”.

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

Other than repeating in various places that the “change” from “irrigation to recharge for irrigation took place prior to November 19, 1987”, there are no facts set forth supporting this conclusion, and no explanation of when or how incidental recharge became “recharge for irrigation”.

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.

The statements that there is no injury or enlargement are wholly conclusory, and there are no facts indicating how or when IDWR came to such a conclusion or the factors that were reached in making this conclusion. Further, these statements are not supported by the Settlement Agreement, which makes no findings concerning injury or enlargement. The Agreement speaks for itself.

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 or enlargement, the criteria of the accomplished transfer statute, Idaho Code § 42-1425, were met.

This conclusory paragraph summarizes the objectionable statements made in other areas of the Affidavit, offers no probative value, and is made without proper foundation.

Second Affidavit of Steven T. Howser

The Second Affidavit of Steven T. Howser contains multiple conclusory statements and statements that aren't based upon personal knowledge:

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".

There is nothing in the record to support these conclusions. I.R.C.P. 56(e) requires that sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, and the "records and maps" referred to in the Affidavit, both ASCC's and IDWR's, are not in the record. Further, there is nothing in the record to show when incidental recharge became "recharge for irrigation".

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.

There is nothing in the record to support the conclusions stated in this paragraph, "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”, and no such finding is made in the Settlement Agreement. Further, the statement “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.” is wholly conclusory, is not supported by facts and is made without foundation.

7. The change in the actual 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.

Mr. Howser’s Affidavit states that he became manager of ASCC in 1998, and there is no indication in the record of how he has personal knowledge of what was occurring before November 19, 1987. There is nothing in the record to indicate when the “actual use of water” to include “recharge for irrigation” took place, and nothing in the record to indicate when IDWR or ASCC decided that incidental recharge became “recharge for irrigation”. ASCC has not claimed a water right based upon “recharge for irrigation” at any time during the adjudication.

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. . . .

There is no foundation for this conclusion. Further, prior to the signing of the Settlement Agreement in 2002, there is nothing in the record indicating when ASCC believed that it was diverting

any water 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. . . .

Same objection as to paragraph 8.

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. . . .

There are absolutely no facts in the record to support this conclusory paragraph, and this statement contradicts the Settlement Agreement and other statements made in Karl Dreher’s Affidavit that do not state that recharged water is the “source of supply”, but rather that water that is “recharged for irrigation”, nee incidental recharge, is used to mitigate for and replace the depletions caused by ground water pumping.

Affidavit of Michael Holliday

In Mr. Holliday’s Affidavit, he states in paragraph 3 on page 2:

I prepared the Recommendation consistent with IDWR’s understanding of the agreement.

The agreement speaks for itself. There is nothing in the record establishing how IDWR reaches an “understanding” of the agreement, or an understanding of any agreement for that matter. Obviously, individuals employed or contracted by IDWR may have their interpretation of the agreement, and those interpretations may have played a role in the recommendation, but there is no foundation in Mr. Holliday’s Affidavit on who those individuals are, when the understanding was reached, who was

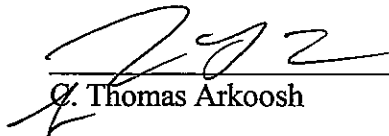
present, who directed Mr. Holliday to prepare the recommendation, who approved the recommendation or how the "understanding" was determined.

CONCLUSION

As described above, the Affidavit of Karl Dreher, the Second Affidavit of Steven T. Howser and the Affidavit of Michael Holliday contain multiple statements that are conclusory, are not made on personal knowledge, are made without foundation, and are otherwise not in compliance with the requirements of I.R.C.P. 56(e). Those portions of the Affidavits that do not comply with the requirements of I.R.C.P. 56(e) should be struck and not considered in the pending summary judgment proceedings.

DATED this 23rd day of April, 2009.

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CERTIFICATE OF SERVICE

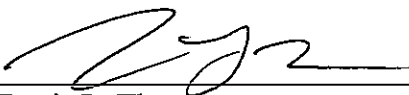
I hereby certify that on the 23rd day of April, 2009, I served by first class mail, postage prepaid, a copy of the foregoing OBJECTION TO AND MOTION TO STRIKE AFFIDAVITS upon the following:

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