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APR 27 2009

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	)	Subcase Nos. 01-23B
	)	
Case No. 39576	)	OBJECTORS' REPLY IN SUPPORT
	)	OF JOINT 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 Reply in support of the Objectors' *Joint*

REPLY IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT

Motion for Summary Judgment. As discussed below, the Claimant Aberdeen-Springfield Canal Company (“ASCC”) has failed to demonstrate that the “recharge for irrigation” purpose of use on water right 1-23B is authorized under Idaho law. Accordingly, summary judgment is appropriate to dismiss the “recharge for irrigation” purpose of use as a matter of law.

ASCC’s sole responses to the Objectors’ motion are that (i) the Director’s Report is *prima facie* evidence that “recharge for irrigation” is appropriate and (ii) that the accomplished transfer statute resolves all issues raised by the Objectors. Neither of these justifications withstand scrutiny.

First, while a Director’s Report establishes a presumption as to the elements of the water right, *see* Idaho Code § 42-1411(4), that presumption does not automatically result in a partial decree when objections are filed. Furthermore, it does not, as ASCC implies, establish as a foregone conclusion that the Director’s Report will, or should, be adopted, particularly when there is no legal basis for the recommended “recharge for irrigation” purpose of use. As explained in the Objectors’ motion for summary judgment and its accompanying documents, ASCC’s water right 1-23B was previously decreed for “irrigation” purposes only. Thereafter, before this Court ASCC twice claimed an “irrigation” purpose of use only as well. *See* Exs. D, F to *Thompson Aff.* Where a claimant seeks an “irrigation” use only, and that use has been confirmed by prior decrees, IDWR has no basis to recommend a different purpose of use in the SRBA, particularly when the recommended use was not authorized under Idaho law until 1978.

Second, contrary to ASCC’s argument, the accomplished transfer statute (Idaho Code § 42-1425) does not erase or justify the unlawful defects in the recommendation for water right 1-23B. The basis of ASCC’s claim relative to the accomplished transfer statute is based on the following facts:

1. An understanding that “recharge” was not recognized as a beneficial use until 1978, *ASCC Br.* at 2 (“Recharge subsequently became a recognized beneficial use upon the enactment of Idaho Code § 42-4201, in 1978”);

2. A recognition that “recharged occurred after this water right was originally decreed ... yet long before the November 19, 1987 commencement of the [SRBA],” *id.* at 7;

3. A claim that ASCC’s ground water right (35-4246 and 35-2543) “have as their source of supply for irrigation water recharge ground water under ASCC’s Water Right 1-23B,” *id.* at 8;

4. The priority dates for the ground water rights are 1934 (35-4246) and 1958 (35-2543), *id.*;

5. “Accordingly, based upon these facts and pursuant to the accomplished transfers statute, the Director not only had a right, but an obligation, to recommend” water right 1-23B with a “recharge for irrigation” purpose of use, *id.*

While ASCC relies upon conclusory statements not supported by the existing record, which should be subject to further discovery provided they are not stricken (*See Objectors’ Motion to Strike and Objectors’ Response to ASCC’s Motion for Summary Judgment and Rule 56(f) Request for Depositions to be Allowed Before Hearing*), those bare allegations do not provide a sufficient basis to decree ASCC’s recommendations in light of the outstanding objections. As set forth in the *Objectors Response to ASCC’s Motion for Summary Judgment and Rule 56(f) Request for Depositions to be Allowed Before Hearing* (filed concurrently

herewith), there is no foundation for the facts alleged by the affiants to support the “recharge for irrigation” purpose of use. As such, the Court cannot simply decree the recommendations as a matter of law as ASCC suggests. Moreover, ASCC claims that, notwithstanding the fact that recharge was not a recognized beneficial use until 1978, the Director had an “obligation” to recommend “recharge for irrigation” since the water was allegedly used in association with the development of ASCC’s 1934 and 1958 ground water rights.¹ No such obligation exists. Indeed, ASCC’s supplemental water right 35-2543 is a previously licensed right to use ground water. ASCC’s supplemental water right 35-4246 is a beneficial use claim to use ground water. Neither right has “recharge” from diversions under water right 1-23B as the source of the water right’s supply. No such source was previously licensed or claimed in the SRBA. Accordingly, the facts as they exist do not support ASCC’s theory, and certainly do not support decreeing the recommended “recharge for irrigation” purpose of use as a matter of law.

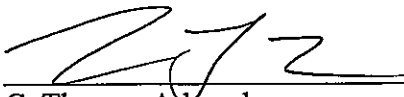
In summary, the Director cannot recommend a water right with a beneficial use that was not recognized at the alleged time of development. ASCC’s prior decrees are explicit which confirm ASCC’s right to use water right 1-23B for “irrigation” purposes only. Here, ASCC claims that it was using its surface water right for “recharge” as many as 44 years before that purpose was recognized as a beneficial use in Idaho. This argument cannot withstand scrutiny and is inconsistent with the water right claims filed by ASCC with this Court (claiming “irrigation” only for water right 1-23B).

For these reasons, ASCC’s claimed “recharge for irrigation” purpose of use fails as a matter of law and should be dismissed with prejudice.

¹ Regardless of the asserted original source of water for ASCC’s ground water rights, the law did not allow for “recharge” as a beneficial use at the time of their development. Any attempt by ASCC to bootstrap its 1934 and 1958 ground water diversion into a claim for “recharge” under its prior right is not supported by the law.

DATED this 23rd day of April, 2009.

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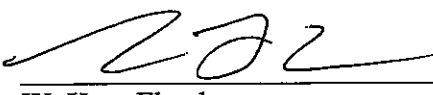
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CERTIFICATE OF MAILING

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

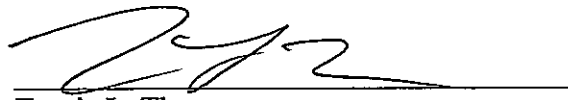
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