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DEPARTMENT OF
WATER RESOURCES

Attorneys for Wilder Irrigation District, Objector

**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.: 63-32533**
)
) **WILDER IRRIGATION**
) **DISTRICT'S MEMORANDUM IN**
) **SUPPORT OF MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
)

COMES NOW, the Objector, Wilder Irrigation District ("WID" or "Wilder"), by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this *Memorandum in Support of Motion for Partial Summary Judgment*, pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure and Rule 6(4)(f) of this Court's Administrative Order 1 ("AO1"). Wilder's motion and memorandum are supported by the *Affidavit of Vern E. Case*, ("Case Aff."), filed together herewith. The hearing on motion for summary judgment is currently set for September 4, 2009, with the trial set for October 30, 2009.

INTRODUCTION

Water right 63-32533 is a waste water right. The water is diverted from the Case Drain, which was constructed and operates to gather drainage or waste water from the Wilder Irrigation District. In subcase 63-27475, the Special Master recently confirmed the rights of a "paramount

appropriator” as it relates to the diversion and use of waste and seepage waters. Specifically, the “paramount appropriator” – here, Wilder – has the right to cease wasting, recapture the waste or to change the place or manner of wasting. Here, it is undisputed that the water being diverted under water right 63-32533 is waste water. In accordance with Idaho law, therefore, a comment is necessary to ensure that future administration of water right 63-32533 is consistent with Wilder’s rights as the “paramount appropriator.” Since there are no material facts in dispute, summary judgment is appropriate.

STATEMENT OF FACTS

Water right 63-32533 is claimed by Joe Aten, Matthew Aten, Bill Aten and Maria Morales (“Claimants”) and has the following elements:

Source:	Case Drain Ditch
Priority Date:	11/04/1933
Point of Diversion:	SW¼ NE¼ §13, T4N, R6W, Canyon County
Place of Use:	SW¼ NE¼ §13, T4N, R06W
Purpose, Quantity & Period of Use:	Irrigation, 1 cfs 04/01-11/01 Stockwater, 0.03 cfs 01/01-12/31

This water right was developed in 1933 by Walter Ray Aten. According to Bill Aten, son of Water Aten, the water being developed was “drainage water.” *Arrington Aff.* Ex. A. In a written statement, dated September 14, 2006, Bill Aten informed the Department that “my father ‘Walter Ray Aten put a tile under the Riverside Ditch to get *drainage water* out of what is known as “case drain.””” *Id.* (emphasis added).

The *Affidavit of Vern Case* further confirms that water diverted under water right 63-32533 is waste water. *Case Aff.* ¶ 6. Water gets to the Claimants’ point of diversion by way of the Arena, Case and East Arena Drains. *Id.* These drains gather waste and seepage water throughout the Wilder Irrigation District. *Id.* Waste water diverted under water right 63-32533

flows west, from the Arena Drain to the Case Drain. *Id.* ¶¶ 4-5 & Ex. A. Near where the Arena Drain turns into the Case Drain, there is a headgate that, when opened, allows the waste water to flow into the East Arena Drain. *Id.* Unless the East Arena Drain is checked up, the waste water will flow directly to the Riverside Canal pursuant to a contract between Wilder, the Boise Project Board of Control, and the Riverside Irrigation District. *Id.* If checked up, however, the water backs up in the East Arena Drain and overflows into a pipe that conveys the waste water under the Riverside Canal and to the place of use on the Claimants' property.

The recommendation from the Idaho Department of Water Resources ("Department") in December, 2006 and, again, concluded that water being diverted under water right 63-32533 is waste water. The recommendation included the following comment:

This right remains subject to the right of the original appropriator, is good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

According to the Department's representations made during the initial hearing on this matter, the above comment is used by the Department to identify water rights that divert waste or seep water – i.e. "waste water rights." As such, inclusion of this comment on water right 63-32533 means that the Department considers water right 63-32533 to be a waste water right.

On June 18, 2007, Wilder filed a timely objection to water right 63-32533, asserting that the source of the water is waste water that belongs to the Wilder Irrigation District, that the right had been developed in trespass and that the Department's waste water comment does not adequately protect Wilder's interests and legal rights as the paramount appropriator. Wilder sought inclusion of an alternate comment that better protects Wilder's rights. That comment provides:

The source of this right is waste water. The wasting of water may be

discontinued at any time.

The Claimants did not file an objection to the Department's recommendation and recognition of water right 63-32533 as a waste water right. This failure to object is consistent with the Claimants' prior admission that the water being diverted is "drainage water." *Arrington Aff.* Ex. A.

Finally, Claimants also own and divert 0.6 shares of Riverside Irrigation District water that is delivered to the same property as water right 63-32533. *Id.* ¶ 7. This water is delivered through the Riverside Canal, not the Case Drain. Wilder does not object to the Claimants' receipt and use of this water.

STANDARD OF REVIEW

Summary judgment shall be rendered when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c).

Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 175 P.3d 172 (2007). However,

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470 (Ct. App. 1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519 (1982)).

A party opposing a motion for summary judgment cannot rely upon bare conclusory allegations:

The burden of proving the absence of an issue of material fact rests at all times upon the moving party. To meet this burden the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. ***The non-moving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact.***

Blickenstaff v. Clegg, 140 Idaho 572, 577 (2004) (internal citations omitted) (emphasis added).

ARGUMENT

I. As a Waste Water Right, Water Right 63-32533 is Subject to the Right of the "Paramount Appropriator" to Cease Wasting, Change the Place or Manner of Wasting, or to Recapture the Waste Water.

Under Idaho water law, an appropriator cannot be forced to continue wasteful irrigation practices. Rather, the appropriator can cease wasting that water and can recapture and re-use the waste water. *See, e.g., Hidden Spring Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680 (1980) (citing *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173 (1945)); *Memorandum Decision and Order on Motion for Summary Judgment; Special Master's Report and Recommendation*, Subcase 63-27475 (May 2, 2008) (the "Janicek decision").

In the Janicek decision, this Special Master affirmed the right of the "preeminent appropriator" to cease wasting water, to recapture and reuse waste water or to change the manner of wasting the water. In the Janicek decision, at page 10, the Special Master affirmed the longstanding law relating to waste water:

The *Director's Report* for water right 63-27475 contains no remark regarding the fact that a substantial portion of the water in Purdam Gulch Creek drain is waste water and seepage coming from lands irrigated by water diverted from the Boise River under NMID's water rights. Under Idaho Law, the NMID ***has the right to recapture and re-use any of this water*** that can reasonably be identified as originating from water diverted under its water rights. ***This right***

to recapture and re-use is unaffected by junior appropriations of the waste or seepage water. The water so re-used by NMID is pursuant to the right(s) under which the water was first diverted, and not as an independent water right to the use of the seepage or drain water. ... The NMID is the paramount appropriator of the water that can be so identified, and as such the right of the NMID to capture and re-use this water is superior to Janicek's right. ... ***Janicek does not have a vested right to such seepage and waste water as against the NMID's paramount ownership.***

(citation omitted) (emphasis added).

Furthermore, the "paramount appropriator's" rights are "superior to" subsequent appropriations of waste water in "two respects:"

First, the NMID's right is superior based on relative priority dates. ... Secondly, and irrespective of the relative priority dates, NMID is the paramount appropriator and has the right to cease wasting the water, in good faith change the place or manner of wasting it, or to recapture it, so long as the NMID applies it to beneficial use within the parameters of the water right(s) under which it was diverted.

Id. (citations omitted).

Here, there is no dispute that the water being diverted by the Claimants is waste water. First, the water right was admittedly developed to divert "drainage water." *Arrington Aff.* Ex. A. Second, the Claimants did not object to the Department's recommendation of a waste water comment on water right 63-32533. This is consistent with their admission that they divert "drainage water" under this water right. Finally, the water flowing in the Arena, Case and East Arena Drains is waste water gathered from the Wilder Irrigation District. *Case Aff.* ¶ 6. As such, water right 63-32533 is subject to the right of Wilder, as the "paramount appropriator," to cease wasting, change the place or manner of wasting or to recapture the waste water. In the absence of any disputed material fact, summary judgment is appropriate.

II. A Comment is Necessary for Future Administration.

Idaho Code § 42-1411(2)(j) provides that a water right should include "such remarks and

other matters as are necessary for definition of the right, for clarification of any element of a right, or for *administration of the right by the director.*” (Emphasis added). Since water right 63-32533 diverts waste water which is subject to the right of the “paramount appropriator” to cease wasting, recapture the waste water or to change the location or manner of wasting, a “remark is necessary to define [the Claimants’] right to show that the right is not subject to the same panoply of rights associated with a water right with a source that does not include waste water.” Janicek decision at 11.

Since there is no dispute that all of the water diverted under water right 63-32533 is waste water, the following remark should be included on water right 63-32533:

The source of this right is waste water. The wasting of water may be discontinued at any time.

Such a comment will ensure that future administration of water right 63-32533 is conducted consistent with the rights of the “paramount appropriator.”

III. Wilder Will Withdraw its Remaining Objections Should the Court Grant its Summary Judgment Motion.

In addition to asserting that a waste water comment should be included on water right 63-32533, Wilder’s objection stated that the water right was developed in trespass and should, therefore, not exist. Should the Court grant Wilder’s summary judgment motion, and include the above waste water comment on water right 63-32533, then Wilder will withdraw its remaining objections as to water right 63-32533.

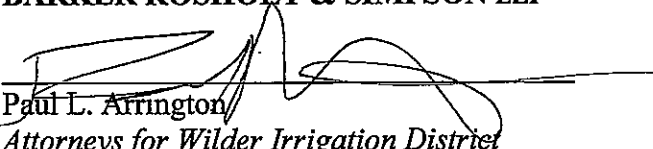
CONCLUSION

Water right 63-32533 is a waste water right. The Department concluded as much when it placed the Department’s general waste water comment on the recommendation. The Claimants did not dispute this, rather, they stated that they “agree” with the Department’s characterization.

Since the water right diverts waste water, a comment is necessary to ensure that future administration is consistent with Wilder's rights as the "paramount appropriator." Since there are no material facts in dispute, summary judgment is appropriate.

Dated this 7th day of August, 2009.

BARKER ROSHOLT & SIMPSON LLP



Paul L. Arrington

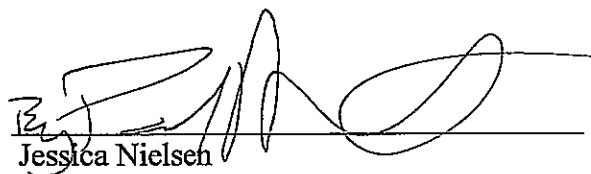
Attorneys for Wilder Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2009, I served true and correct copies of the foregoing **WILDER IRRIGATION DISTRICT'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** by the method indicated below, and addressed to the following:

VIA U.S. MAIL POSTAGE PREPAID

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