

Albert P. Barker, ISB # 2867
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P. O. Box 2139
Boise, ID 83701-2139
Telephone: 208-336-0700
Facsimile: 208-344-6034

Attorneys for Rocky Sherbine

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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. 37-2561, 37-2582,
) 37-2682 & 37-115D
)

) **MEMORANDUM IN SUPPORT**
) **OF CLAIMANT'S MOTION FOR**
) **PARTIAL SUMMARY**
) **JUDGMENT (Rocky Sherbine)**
)

COMES NOW, the Claimant, Rocky Sherbine, by and through his attorneys of record, Barker Rosholt & Simpson, LLP, and submits this memorandum in support of the *Claimant's Motion for Partial Summary Judgment (Rocky Sherbine)*. This memorandum is supported by the *Affidavit of Paul L. Arrington (Rocky Sherbine)* ("Arrington Aff.").

INTRODUCTION

"Collateral attacks on license or transfer decisions are not appropriate in the SRBA." *Order on Motion to Dismiss Objections & Request for Attorney Fees*, Subcase Nos. 37-494, *et al* (The Valley Club) (Oct. 10, 2008) (the "*Valley Club Order*"). In disregard of this law, Newfoundland Partners and Sinclair Oil Corporation dba Sun Valley Co. (collectively the "Objectors") have filed late *Objections* to elements of the above water rights that were determined and/or confirmed through prior licensing and transfer proceedings before the Idaho

Department of Water Resources (“Department”). For each of these elements, the Director’s recommendations are *identical* to the element as determined or confirmed through the administrative proceedings. Claimant has repeatedly asked Objectors to explain their position with respect to these objections to licensed and transferred rights in light of the *Valley Club Order* and other similar decisions from this Court, but without any success. The Objectors have failed to provide any basis in law or fact for their objections to these administratively determined elements. Since the recommended elements are identical to the licensed or transferred elements, Objectors cannot sustain their objections and summary judgment is appropriate.

STATEMENT OF FACTS

On July 31, 2008, the Special Master issued an *Order Granting Motion to File Late Objection and Setting Deadline* in the above subcases. These objections seek to challenge elements which were previously determined or confirmed through licensing or transfer proceedings. Summary judgment dismissing the objections to the following elements and water rights is appropriate.

37-2561: Objections were filed as to the quantity and place of use for this water right. The water right is based on License No. G-25224 and was recommended with the same quantity and place of use. *Arrington Aff.* ¶ 3, Exs. A & B.¹

37-2582: Objections were filed as to the quantity and place of use for this water right. The water right is based on License No. G-25981 and was recommended with the same quantity and place of use. *Arrington Aff.* ¶ 4, Exs. C & D.²

¹ Water Right No. 37-2561 was recommended with a slightly lower diversion rate than the license (3.94 cfs v. 3.82 cfs) and a slightly smaller place of use (197.4 acre v. 191 acres). *Arrington Aff.* Exs. A & B. The Claimant has not objected to these minor reductions in the recommended diversion rate or place of use.

² Water Right No. 37-2582 was recommended with a slightly smaller place of use than the license (140 acres v. 137 acres). *Arrington Aff.* Exs. C & D. The Claimant has not objected to the minor reduction in the recommended place of use.

37-2682: Objections were filed as to the quantity and period of use for this water right. The water right is based on License No. G-30281, and was confirmed through Transfer No. 2381. It was recommended with the same quantity and period of use. *Arrington Aff.* ¶ 5, Exs. E, F & G.

37-115D: Objections were filed as to the quantity and place of use for this water right. The water right was confirmed through Transfer No. 71910 and recommended with the same quantity and place of use. *Arrington Aff.* ¶ 6, Exs. H & I.

The Claimant has asked Objectors to explain the legal basis for their attempt to collaterally attack the licenses and transfers underlying these water rights. No explanation has been provided. Hence, summary judgment on this issue of law is necessary.

STANDARD OF REVIEW

Summary judgment is appropriate if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow’s Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982). There are no facts in dispute. The law is clear. Summary judgment is appropriate.

ARGUMENT

“The law of the case in the SRBA is that a party may not subsequently challenge elements or conditions decided in a license.” *Valley Club Order* at 5; *see also, e.g.,*

Memorandum Decision & Order on Motions for Summary Judgment, (Subcase Nos. 63-2529, *et al.*) (June 11, 2009) (attempt to challenge licensed diversion volume “constitutes an impermissible collateral attack on the prior administrative proceedings”); *Memorandum Decision and Order on Challenge; Order on State's Motion to Dismiss Claimant's Notice of Challenge* (Subcase No. 36-8099) (2000) (IDWR license becomes final when the time to appeal it has expired); *Response to United States Motion for Status Conference*, (Subcase No. 03-10022) (2000) (scope of what can be litigated in SRBA is limited and does not include collateral attacks on previously perfected water rights); *Memorandum Decisions & Order On Challenge, Order On State of Idaho's Motion to Dismiss Claimants Notice of Challenge*, (Subcase No. 36-8099) (2000) (collateral attack on IDWR license is not permissible when a party has failed to exhaust administrative remedies); *Order on Challenge of “Facility Volume” Issue & Additional Evidence Issues*, (Subcase Nos. 37-2708, *et al.*) (1999) (the SRBA Court disfavors collateral attacks on licenses). This same “law of the case” prohibits collateral attacks to transfer proceedings. *Valley Club Order* at 5. (“Collateral attacks of transfers should be disfavored in the SRBA just as collateral attacks of licenses”). Under this Court’s decisions, Objectors are barred from challenging the elements to a water right that were decided or confirmed through licensing or transfer proceedings. *Id.*

License and transfer proceedings provide for notice and Objectors could have filed protests and requested a hearing.³ The Objectors did not participate in any of the administrative proceedings resulting in these licenses and transfers. Hence, they are barred from collaterally attacking the final administrative decision in the SRBA. *Id.*

³ As discussed in the *Valley Club Order*, the statutes governing licensing and transfer proceedings require the filing of an application and posting of notice. See Idaho Code §§ 42-203A (license/permit) & 42-222 (transfer). They each provide an opportunity to protest the license/transfer and to have an administrative hearing before the Department. *Id.* Finally, a party may seek judicial review of the final agency decision. *Id.*

Ignoring this law, Objectors have filed late objections on many water rights where the Director's recommendation was based on licenses or transfer proceedings. As described above, Objectors have challenged elements of the water rights that are unchanged from the determinations of the license or transfer process. The Objectors, Sinclair Oil and Newfoundland Partners, were parties to the *Valley Club* subcases, 37-494 *et al.* They filed a responses to the objections raised against the Valley Club's rights, attended the summary judgment hearing, and were served with the Court's Order. They cannot claim ignorance of the decision, and they do not. They did not appeal that decision. Objectors cannot support these late objections to the licensed and transferred water rights and summary judgment is appropriate.

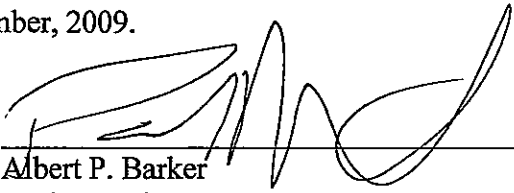
Claimant has tried for months to obtain an explanation from Objectors of the legal basis for their collateral attacks on the Claimant's licenses and transfers. Counsel met in early March and asked for an explanation. At the initial hearings in April, the request was repeated. In June a detailed letter was sent to Objectors, asking the same question and specifically identifying all the Claimant's licensed and transferred rights to which Objectors have objected. Objectors responded with a letter in August, but that letter did not address the basis for the collateral attacks. A follow up telephone discussion revealed nothing further on the basis for these collateral attacks. If Objectors have a basis for their collateral attacks they have not revealed it, strongly suggesting there is none.

CONCLUSION

Here the Objectors have challenged elements to the above water rights that were conclusively determined or confirmed through licensing or transfer proceedings before the Department. The recommendations for these elements are identical to the underlying administrative decisions. Since the Objectors cannot raise such challenges in the SRBA,

summary judgment dismissing the objections to these licensed or transferred elements is appropriate.

DATED this 1st day of September, 2009.



Albert P. Barker
Paul L. Arrington

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 1st day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to each of the following:

Scott L. Campbell
Tara Martens
Dylan B. Lawrence
Andrew J. Snook
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS
101 So. Capital Blvd., 10th Floor
P. O. Box 829
Boise, ID 83701

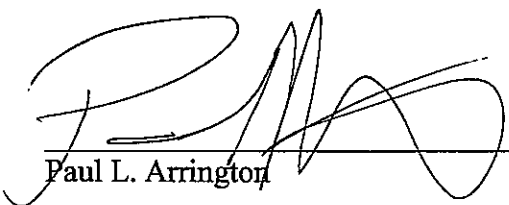
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ Electronic Mail

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
P. O. Box 83720
Boise, ID 83720-00098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ Electronic Mail

Chief, Natural Resources Division
Office of the Attorney General
STATE OF IDAHO
P. O. Box 44449
Boise, ID 83711-2530

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ Electronic Mail


Paul L. Arrington