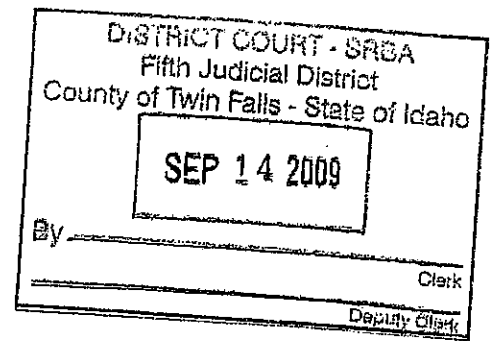


RECEIVED

SEP 15 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

Case No. 39576

) ORDER GRANTING MOTION FOR
) SUMMARY JUDGMENT
)
) SPECIAL MASTER'S REPORT
)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
)
) FOR WATER RIGHT 63-32533

A notice of claim was filed for water right 63-04035 by Bill Aten, Joe Aten, Matthew Aten, and Maria L. Morales (hereinafter "Claimants") for 0.20 cfs of water from the Case Drain for the irrigation of 30 acres and 0.03 cfs for year 'round stockwater use. The basis of the claim is beneficial use. Prior to the filing of the *Director's Report* water right 63-04035 was split into water rights 63-32533 and 63-32534. Water right 63-32534 has changed ownership and is not at issue herein. The *Director's Report* for water right 63-32533 recommended 0.13 cfs of water from the Case Drain for the irrigation of 6.7 acres and 0.03 cfs for year 'round stockwater use.

On June 18, 2007, the Wilder Irrigation District, through its attorney Albert P. Barker, filed an objection to the *Director's Report*, making alternative assertions that the source should be described as waste water belonging to the Wilder Irrigation District, and that the water right should not exist.

On August 6, 2009, the Wilder Irrigation District filed a *Motion for Partial Summary Judgment*, together with a *Memorandum in Support of Motion for Partial Summary Judgment*, the *Affidavit of Paul L. Arrington*, and the *Affidavit of Vern E. Case*. Oral argument on summary judgment was held on September 4, 2009. The Claimants did not file any briefing or affidavits in opposition to the Wilder Irrigation District's *Motion*

for *Partial Summary Judgment*, nor did the Claimants attend or participate in the oral argument.

The undisputed facts on file in this subcase set forth in the *Director's Report*, the *Affidavit Paul Arrington* and the *Affidavit of Vern E. Case* show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. Specifically, the record demonstrates that the water which accumulates in the Case Drain is in fact wastewater first diverted by the Wilder Irrigation District. Therefore the Claimant's water right is subject to Idaho law regarding the relationship between a user of waste water (the Claimants), and the original or "paramount" appropriator (The Wilder Irrigation District). The *Director's Report* for water right 63-32533 included a remark regarding this relationship as follows:

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

The Wilder Irrigation District seeks to replace the above-quoted remark from the *Director's Report* with the following:

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

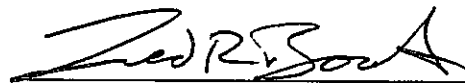
The Wilder Irrigation District asserts that such a remark "will ensure that future administration of water right 63-32533 is conducted consistent with the rights of the 'paramount appropriator.'" *Memorandum in Support* at p. 7. Wilder Irrigation District's assertion is consistent with this Special Master's ruling in the Janicek decision, wherein it was stated that a "remark is necessary to define [the Claimant's] 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." *Memorandum Decision and Order on Motion for Summary Judgment; Special Master's Report and Recommendation*, Subcase 63-27475 (May 2, 2008). The Wilder Irrigation District's assertion is also consistent with Idaho Code § 42-1411(2)(j), which 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).

Again, the Claimants have not filed any briefing or affidavits to show that either the water in the Case Drain is not wastewater, or that a remark is not necessary for future administration of the right. The party opposing a motion for summary judgment may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertions of the moving party. *Amborse v. Buhl Joint School Dist No. 412*, 126 Idaho 581, 584 (Ct. App. 1985).

In accordance with the foregoing, the Wilder Irrigation District's *Motion for Partial Summary Judgment* is **granted**, resulting in the recommendation herein that the Claimant's water right be decreed in the SRBA with the elements as set forth in the *Director's Report* with the exception that the waste water remark included therein be deleted and replaced with the waste water remark prayed for by the Wilder Irrigation District.

Therefore, based on the file and record herein, IT IS RECOMMENDED that water right 63-32533 be **decreed** with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated Sept. 14, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
SEP 14 2009	
By _____	Clerk
Deputy Clerk	

In Re SRBA)
)
Case No. 39576)
)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 63-32533

NAME AND ADDRESS: BILL ATEN
21737 CASE LN
WILDER, ID 83676

JOE ATEN
MARIA L MORALES
MATTHEW ATEN
30588 PECKHAM RD
WILDER, ID 83676

SOURCE: CASE DRAIN TRIBUTARY: SNAKE RIVER

QUANTITY: 0.16 CFS

This right when combined with all other rights shall not exceed
0.02 cfs per acre.
The quantity of water under this right for stockwater use shall
not exceed 13,000 gallons per day.

PRIORITY DATE: 11/04/1933

POINT OF DIVERSION: T04N R06W S13 NWNE Within Canyon County

PURPOSE-AND

PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-01 TO 11-15	0.13 CFS
	Stockwater	01-01 TO 12-31	0.03 CFS

PLACE OF USE: Irrigation Within Canyon County
T04N R06W S13 SWNE 6.7
6.7 Acres Total

Stockwater Within Canyon County
T04N R06W S13 SWNE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The quantity of water decreed for this water right for
stockwater use is not a determination of historical beneficial
use.

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION

SEP 14 2009

Lawrence Booth
SPECIAL MASTER

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
SEP 14 2009
By _____ Clerk
Deputy Clerk

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)
_____))

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

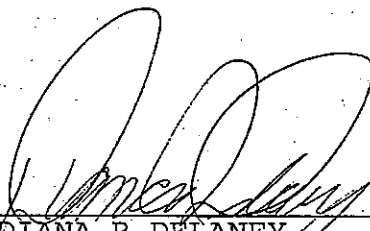
Water Right(s) : 63-32533

On September 14, 2009, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

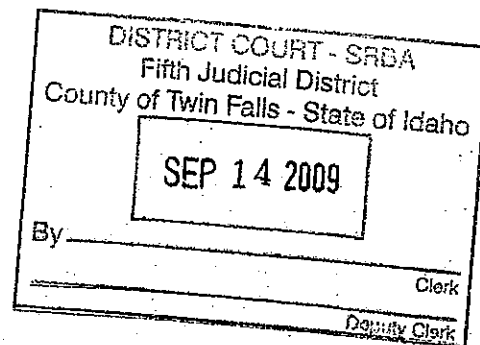
Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED September 14, 2009.



DIANA R DELANEY
Deputy Clerk



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)
_____)

CERTIFICATE OF MAILING

Water Right(s) : 63-32533

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on September 14, 2009, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

WILDER IRRIGATION DISTRICT

Represented by:
ALBERT P BARKER
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

USDI BUREAU OF RECLAMATION

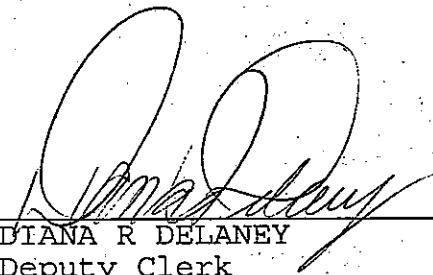
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

CERTIFICATE OF MAILING

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09/14/09

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WILDER, ID 83676
Phone: 208-482-6963

JOE ATEN
MARIA L MORALES
MATTHEW ATEN
30588 PECKHAM RD
WILDER, ID 83676



DIANA R DELANEY
Deputy Clerk