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RACINE OLSON NYE BUDGE & BAILEY DEPARTMENT OF
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W. MARCUS W. NYE
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JOHN A. BAILEY, JR.
JOHN R. GOODELL
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THOMAS J. BUDGE
CANDICE M. MCHUGH
JONATHAN M. VOLYN
MARK A. SHAFFER
JASON E. FLAIG

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: tjb@racinelaw.net

BURGE OFFICE
101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE
477 SHoup AVENUE
SUITE 107
POST OFFICE BOX 50688
IDAHO FALLS, ID 83405
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

COEUR D'ALENE OFFICE
250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2008)
WILLIAM D. OLSON, OF COUNSEL

September 23, 2009

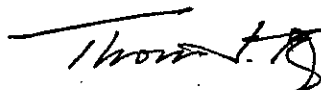
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Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707
Fax: 208-736-2121

Re: Subcase Nos. 22-13167, 22-13169, 22-2280E

Dear Clerk:

Attached for filing please find *Claimants' Trial Brief*. Thank you for your assistance.

Sincerely,


THOMAS J. BUDGE

TJB:rr
Attachment
cc: Service List

Randall C. Budge, ISB No. 1949
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
Post Office Box 1391
201 E. Center Street
Pocatello, Idaho 83204-1391
208-232-6101 - Telephone
208-232-6109 - Fax

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DEPARTMENT OF
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Attorneys for the Claimants

**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. 22-13167,
22-13169, 22-2280E

CLAIMANTS' TRIAL BRIEF

Cedron Irrigation, LLC ("Cedron") and Trees, Inc. ("Trees") (collectively, the "Claimants") submits this trial brief pursuant to the Court's *Trial Scheduling Order* dated February 2, 2009.

SUMMARY OF THE ARGUMENT

The objections filed by Mike Reid have no legal basis and should be denied. Cedron and Trees should be awarded their attorneys fees for having to defend against Reid's frivolous objections.

STATEMENT OF THE CASE

A. Procedural History.

Cedron filed claims in the SRBA for water rights 22-13167 and 22-13169. Trees filed a claim for water right 22-2280E. Mike Reid filed objections to the quantity and purpose of use elements of all three rights. In addition, Reid objected to the period of use element of water right 22-2280E.

Reid filed a motion to consolidate subcases 22-13167 and 22-13169 with subcase 22-2280E because the three water rights share the same parent right (22-2280). The Court granted the motion with respect to the presentation of evidence at trial, but denied the motion to the extent it seeks changes to the discovery process. (Order on Mot. to Consolidate 1.) No other pre-trial motions have been filed.

B. Issues Remaining for Trial.

As there have been no dispositive pre-trial motions, Reid's objections to the quantity, purpose of use, and season of use elements remain at issue for trial. Specifically, the issues for trial are:

- 1) Whether Cedron has partially forfeited the quantity of water it may divert under water rights 22-13167 and 22-13169.
- 2) Whether Trees has partially forfeited the quantity of water it may divert under water right 22-2280E.
- 3) Whether Cedron's and Trees' water rights should be restricted to the irrigation of hay and grain.
- 4) Whether Trees' water right 22-2280E should not include the standard extended season remark, even though the remark includes a subordination provision.

C. Legal Standard.

In the SRBA, the claimant has the ultimate burden of persuasion for each element of the claimed water right, but the Director's Report constitutes *prima facie* evidence of the nature and extent of the water rights. Idaho Code § 42-1411(5). Since the Director's Report recommended water rights 22-13167, 22-13169 and 22-2280E as claimed, the objector (Reid) "has the burden of going forward with evidence to rebut the director's report as to all issues raised by [his] objection." *Id.*

D. Statement of Facts.

Cedron will present evidence at trial to prove that water right numbers 22-13167 and 22-13169 claimed by Cedron constitute all of the water rights owned by Cedron. Cedron is an Idaho limited liability company formed for the sole purpose of holding its water rights for delivery to its members. Cedron does not own any of the property irrigated under water rights 22-13167 and 22-13169. Cedron's members irrigate all of the land authorized to be irrigated under water rights 22-13167 and 22-13169.

Trees will present evidence at trial to prove that water right 22-2280E was originally part of Cedron's water rights, but was transferred to Trees on August 4, 2000. Trees will prove that water right 22-2280E has been used continuously since that date. Trees will also show that it replaced its six inch well with a twelve inch well in the year 2004, and that the twelve inch well was put to use within five years after the aforementioned transfer was approved.

There is no legitimate legal basis for Reid's objections. Moreover, the Claimants have made good faith efforts to resolve Reid's objections in a cooperative fashion, to no avail. The Claimants alerted Reid at the initial hearing and again by letter that it would be prudent to cooperatively resolve his objection because there is no legal basis for his objection, and that he will likely be required to pay the Claimants' attorneys fees and costs if he pursues his objection. Reid still refused to withdraw his objection, unnecessarily forcing the Claimants to great expense to defend their water rights against Reid's frivolous objections.

ARGUMENT

I. Water right numbers 22-13167, 22-13169 and 22-2280E are exempt from forfeiture under Idaho Code § 42-223.

Idaho Code § 42-223 outlines exceptions to the rule that water rights may be forfeited by five continuous years of non-use. At least two of the exceptions apply to Cedron. First,

[n]o portion of any water right held by a Carey Act operating company, or any other company, corporation, association or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to non-use by such landowners, shareholders or members, unless the non-use is subject to the control of such entity.

Idaho Code § 42-223(7). Cedron is an entity that holds water rights 22-13167 and 22-13169 for distribution to its landowners, and is therefore exempt from forfeiture under Idaho Code § 42-223.

In addition, Cedron is exempt from forfeiture under the provision that "[n]o portion of any water right shall be lost or forfeited for nonuse if the nonuse results from water conservation practices, which maintains the full beneficial use authorized by the right, as defined in section 42-250, Idaho Code." Idaho Code § 42-223(9). Idaho Code § 42-250 defines "water conservation practices" as "any practice, improvement, project or management program, that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water rights." The "water conservation exemption" ensures

that water users are not penalized for investing in more efficient irrigation practices. For example, if a water user converts from flood irrigation to more efficient sprinkler irrigation, the water conservation exemption ensures that the water user may convert back to flood irrigation if economic or other conditions necessitate.

Reid complains that Cedron diverts less than is authorized under its water rights, asserting that by doing so Cedron has forfeited a portion of its authorized rate of diversion. Yet Cedron's members still irrigate all of the acreage authorized under water rights 22-13167 and 22-13169. Consequently, Cedron is exempted from forfeiture even if it diverts less than it is able to irrigate all of its acres through more efficient practices.

Trees' water right 22-2280E is also exempt from forfeiture under the conservation practices exemption. Idaho Code § 42-223(9). Trees irrigates all of the acres authorized under water right 22-2280E, and has done so continuously since the right was transferred from Cedron. Thus, even if Trees is able to irrigate all of its property without diverting its maximum rate of diversion as a result of its highly-efficient drip irrigation system, Trees is exempted from forfeiture because Trees still irrigates the full number of acres authorized by water right 22-2280E.

II. Even if the Claimants were not exempt from forfeiture under Idaho Code § 42-223, the facts will show a lack of forfeiture of Cedron's water rights.

"Forfeitures are not favored in the law, and clear and convincing proof is necessary to support a claim of forfeiture." *Crow v. Carlson*, 107 Idaho 461, 467 (1984) (citing *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384 (1982)). Even if Cedron's and Trees' water rights were not exempt from forfeiture under Idaho Code § 42-223, Reid will not be able to prove non-use of their water rights for five consecutive years by clear and convincing evidence.

III. There is no basis under Idaho law to support Reid's attempt to restrict the use of the Claimants' water rights to the irrigation of grain or hay.

There is no legal basis in Idaho to limit an irrigation right to specific types of crops. Rather, Idaho law allows irrigators to rotate crops at will to meet market demands. It matters not whether the water right is used to irrigate grain, hay, beets, potatoes, watermelons, raspberry bushes, fruit trees, or landscape trees. So long as the right is used for irrigation, there is no restriction on the type of crops that may be irrigated.

IV. The Claimants should be awarded their attorneys fees.

The prevailing party in litigation may recover its reasonable attorney fees where the criteria established by Rule 54(e)(1) of the Idaho Rules of Civil Procedure are met. Rule 54(e)(1) provides:

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation. . . .

I.R.C.P. 54(e)(1). In determining whether a party prevails, Rule 54(d)(1) requires a court to consider “the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, . . . or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims.” I.R.C.P. 54(d)(1).

The evidence at trial will not only cause the Claimants to prevail, but will also show that Reid’s objections have been pursued frivolously, unreasonably and without foundation.

RESPECTFULLY SUBMITTED.

DATED this 23rd day of September, 2009.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


Thomas J. Budge

*Attorneys for the Claimants, Cedron Irrigation,
LLC, and Trees, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of ~~June~~ ^{September}, 2009, the above and foregoing document was served in the following manner:

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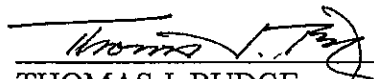
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