

Albert P. Barker ISB #2867
Paul L. Arrington, ISB # 7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

RECEIVED
OCT 28 2009
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	)	
	)	Subcase Nos.: 63-32533
	)	
	)	WILDER IRRIGATION
Case No. 39576	)	DISTRICT'S RESPONSE IN
	)	OPPOSITION TO MOTION TO
	)	ALTER OR AMEND
	)	

COMES NOW, the Objector, Wilder Irrigation District ("Wilder"), by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this response in opposition to the *Motion to Alter or Amend*, filed by the Claimants, Bill Aten, Joe Aten, Matthew Aten and Maria Morales (collectively, the "Atens"). This response is filed pursuant to this Court's Administrative Order 1 ("AO1"). As discussed below, the Claimants have failed to meet their burden. As such, this Court's September 14, 2009 *Order Granting Motion for Summary Judgment & Special Master's Report* ("Order") should not be disturbed.

INTRODUCTION

This Court's *Order* properly confirmed that water right 63-32533 is a waste water right. In fact, Bill Aten, one of the claimants to water right 63-32533, expressly confirmed that the source of water right 63-32533 is waste water. *Affidavit of Paul L. Arrington* ("Arrington Aff.")

**WILDER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO MOTION TO
ALTER OR AMEND**

Ex. A. The undisputed evidence from Vern Case, a life-time local resident and a member of Wilder's Board of Directors, confirmed that the Arena Drain, East Arena Drain and Case Drain were constructed and operate to gather drainage or waste water from the Wilder Irrigation District. *See Affidavit of Vern E. Case ("Case Aff.")*. Nothing in the Atens' letter filing refutes any of these facts, which form the basis of the *Order*. As such, the motion should be denied.

STATEMENT OF FACTS

Wilder provided a detailed statement of facts in its *Memorandum Supporting Motion for Partial Summary Judgment*, filed with this Court on August 6, 2009. Those facts will not be repeated in this brief, but are adopted as though fully set forth herein.

The Atens assert that "my Riverside right should not be allowed for discussion. It does not pertain to this water right 63-32533." *Claimants Mtn.* at 1. Wilder only mentioned the Claimants' Riverside shares to inform the Court and parties that these rights were not objected to in this proceeding:

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

In this case, the Special Master granted Wilder's *Motion for Partial Summary Judgment*. Any party seeking relief from such an order must do so under Civil Rule 60(b). That rule governs motions for relief from judgments or orders of the Court and provides that such relief is only granted in limited situations:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Importantly, however, any party seeking relief under Rule 60(b) must show “unique and compelling circumstances” to justify such relief. *Miller v. Haller*, 129 Idaho 345, 349 (1996). These rules apply to all parties to the SRBA, regardless of whether or not that party is represented by legal counsel. Since the Atens have failed to show any “unique and compelling circumstances,” their motion should be denied.

ARGUMENT

I. The Claimants Failed to Meet the Standard for Relief from the *Order*.

The Atens do not argue that there are any “unique and compelling” circumstances to justify relief from the *Order*. They do not assert that there is any mistake, inadvertence, surprise, new evidence, fraud or any other reason justifying relief. The Atens assert that “water right 63-32533 is a grandfather water right.” Yet, they do not explain what they mean by describing their water right as a “grandfather water right.” Presumably, they mean it pre-existed the SRBA. However, all prior rights must be confirmed in the SRBA.

Next, they argue about the relative priority of their rights against all other water users. Their priority is irrelevant to Wilder’s summary judgment motion, which dealt only with the source of the right as wastewater.

The Atens demand a jury trial. However, there is no basis for a jury trial in the SRBA proceedings, and the failure to have a jury empanelled is not a basis for setting aside the *Order*. Even if they could demand a jury, such a demand does not excuse them from complying with Rule 56.

The Atens do not explain why they failed to respond to Wilder's summary judgment motion or to appear at the summary judgment hearing. They do not even mention or dispute the written statement by Bill Aten admitting that water diverted under water right 63-32533 is "drainage water" from the "Case drain." *Arrington Aff.* Ex. A. Rather, the Atens rest their motion on unsupported "conclusory assertions" and irrelevant issues that cannot provide a basis to oppose a summary judgment motion. *See, supra.* As such, the Atens' motion should be denied.

II. The Atens Have Failed to Provide any Evidence to Show that Summary Judgment Should not be Granted.

A party opposing a summary judgment motion "may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertion of the moving party." *Order* at 3.

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).

Here, the Atens have not even provided "conclusory assertions." There is no evidence to rebut the *Case Aff.*, or the statement of Bill Aten that the water being diverted is "drainage water." *Arrington Aff.* Ex. A. For this reason alone, the Atens' motion should be denied.

Continuing to misunderstand Wilder's objection, the Atens argue that Wilder is trying to deny them a water right. Wilder is not attempting to deny them a water right, but merely to have

the decree recognize the undisputed fact that the source of this right in these developed drains is wastewater. The Atens' misunderstanding of the objection and the *Order* is not grounds to set aside the *Order*.

III. The evidence Supports the Special Master's Decision

The following evidence is presently before the Special Master:

1. *Affidavit of Vern E. Case*: In this affidavit, Mr. Case, a life-long local resident and member of Wilder's Board of Directors, testifies that water diverted under water right 63-32533 from the Case Drain "is waste water that is gathered throughout the Wilder Irrigation District."
2. *Statement of Bill Aten (Arrington Aff. Ex. A)*: In this statement, Bill Aten, one of the Claimants, informs the Department that "a tile" was placed "under the riverside ditch to get drainage water out of what is known as 'Case drain.'"

The Atens do not refute any of the evidence before the Special Master. As before:

[T]he 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.

Order at 3.

The evidence before the Special Master confirms that water right 63-32533 diverts wastewater and that a comment is necessary for the future administration of that right. *See Memorandum Decision and Order on Motion for Summary Judgment; Special Master's Report and Recommendation*, Subcase 63-27475 (May 2, 2008) (the "Janicek decision") at 10-11. As such, the Atens' motion should be denied.

///

///

///

///

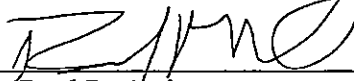
///

CONCLUSION

The evidence is undisputed that water right 63-32533 is a wastewater right, diverting wastewater collected through Wilder Irrigation District. The Atens do not provide any evidence or justification for any contrary conclusion and their motion should be denied.

Dated this 27th day of October, 2009.

BARKER ROSHOLT & SIMPSON LLP



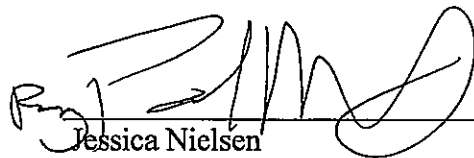
By: Paul L. Arrington

Attorneys for Wilder Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2009, I served true and correct copies of the foregoing **WILDER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO MOTION TO ALTER OR AMEND**, via U.S. mail, postage prepaid, and addressed to the following:

Bill Aten 21737 Case Ln. Wilder, ID 83676	Joe Aten 30588 Peckham Rd. Wilder, ID 83676
Matthew Aten 30588 Peckham Rd. Wilder, ID 83676	Maria L. Morales 30588 Peckham Rd. Wilder, ID 83676
IDWR Document Depository P.O. Box 83720 Boise, ID 83720	United States Department of Justice Environment & Nat'l Resources Div 550 W. Fort Street, MSC 033 Boise, ID 83724
Chief, Natural Resources Division Office of Attorney General P.O. Box 44449 Boise, ID 83711	



Jessica Nielsen