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**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Objector Twin Falls Canal Company

**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.: 47-2489
	)	
	)	MEMORANDUM IN SUPPORT OF
Case No. 39576	)	TWIN FALLS CANAL COMPANY'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT
	)	

COMES NOW, the Objector, Twin Falls Canal Company ("TFCC"), by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby submits this *Memorandum in Support of Motion for Partial Summary Judgment*, pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, Rule 6(4)(f) of this Court's Administrative Order #1 ("AO1") and the August 14, 2009, *Trial Scheduling Order*. TFCC's motion and memorandum are supported by the *Affidavit of Brian Olmstead* ("Olmstead Aff.") and the *Affidavit of Paul L. Arrington*, filed together herewith.

INTRODUCTION

It is undisputed that the source of the above claimed water right is waste or seep water. The water right was originally developed to divert "waste from farms lying on each side of" the

**MEMORANDUM IN SUPPORT OF TWIN FALLS CANAL COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

point of diversion. The law of the SRBA is clear: waste or seep water remains subject to the right of the original appropriator (i.e. “paramount appropriator”) to cease wasting, change the manner of wasting or to recapture. *See, e.g., Memorandum Decision and Order on Motion for Summary Judgment; Special Master’s Report and Recommendation*, Subcase 63-27475 (May 2, 2008) (the “Janicek decision”). This Special Master has held that a remark should be placed on waste water rights to ensure that future administration is consistent with these limitations. *Id.*

Since water right 47-2489 diverts waste water, the following remark should be placed on the water right:

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

STATEMENT OF FACTS

Water right 47-2489 is a waste water right. The right is based on license #11799. *Arrington Aff.* Ex. A. The license identifies the point of diversion as an “unnamed **drainage** coulee.” *Id.* (emphasis added). The *Application for Permit* and numerous *Proof of Application of Water to Beneficial Use: Deposition of Witness* forms each confirm that the water being diverted was from an “unnamed **drainage** coulee.” *Arrington Aff.* Exs. B & C (emphasis added). In fact, the *Application for Permit* provides that “water to be diverted is waste from farms lying on each side of coulee.” *Id.* Ex. B.

While the history of this water right confirms without any dispute that the water being diverted includes “waste water” and “seepage,” the *Olmstead Affidavit* provides additional support for this conclusion. According to Mr. Olmstead, the manager of TFCC, the point of diversion and place of use for the above water right is right below the High Line Canal, which delivers water to many of TFCC’s shareholders. *Olmstead Aff.* at ¶ 3. The area surrounding the

point of diversion contains a large number of seep tiles that were installed by TFCC in the early 1900's as a means of channeling seep water in the area. *Id.* at ¶ 4. These particular seep tiles channel seep water from the "High Line Canal and other Canal Company laterals and ditches, as well as from private ditches and fields irrigated with water delivered by the Canal Company." *Id.* at ¶ 4. According to Mr. Olmstead, water being diverted under this right includes waste water. *Olmstead Aff.* at ¶ 5.

For the reasons as stated herein, summary judgment confirming the source of this water right and including a comment on the water right is appropriate as there are no genuine issues of material fact.

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); see also *Order Granting Motion for Summary Judgment*, Subcase 63-32533 (Sept. 14, 2009) (the "Aten decision").

ARGUMENT

I. All Waste and Seep Water 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 original appropriator – or, the "paramount appropriator" – to cease wasting water, to recapture and reuse waste water or to change the manner of wasting the water. The Special Master affirmed that these rights attach to all waste or seep water that "that can be reasonably identified as originating from water diverted under" the prior water rights. In the Janicek decision, at page 10, the Special Master affirmed the longstanding law relating to waste water:

MEMORANDUM IN SUPPORT OF TWIN FALLS CANAL COMPANY'S MOTION FOR SUMMARY JUDGMENT

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.*

(Citations 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) (emphasis added).

It is indisputable that the source of water for the water right at issue here is waste or seep water. The right diverts "waste from farms" out of an "unnamed drainage coulee." *Arrington Aff.* Ex. B. Mr. Olmstead confirms that the point of diversion is near numerous seep tiles and gathers seep water originating from the High Line Canal. *Olmstead Aff.* ¶¶ 3-5. These facts are not in dispute.

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 the above water right diverts waste or seep water which is subject to the right of the "paramount appropriator" (TFCC) 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; *see also* Aten decision at 2 (confirming that a waste water comment is consistent with the requirements of section 42-1411(2)(j)).

Since there is no dispute that the water diverted under water right 47-2489 is waste water, the following remark should be included on the water right:

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

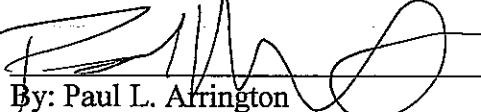
Such a comment will ensure that future administration is conducted consistent with the rights of the "paramount appropriator."

CONCLUSION

Water diverted under water right 47-2489 is waste or seep water. This fact is not in dispute. When waste water is the source, the law of the SRBA demands that a remark be included on the water right to ensure that future administration is consistent with TFCC's rights as the "paramount appropriator." Since there are no material facts in dispute, summary judgment is appropriate.

Dated this 13th day of November, 2009.

BARKER ROSHOLT & SIMPSON LLP



By: Paul L. Arrington
Attorneys for Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2009, I served true and correct copies of the foregoing **MEMORANDUM IN SUPPORT OF TWIN FALL CANAL COMPANY'S MOTION FOR SUMMARY JUDGMENT**, VIA U.S. mail, postage prepaid, and addressed to the following:

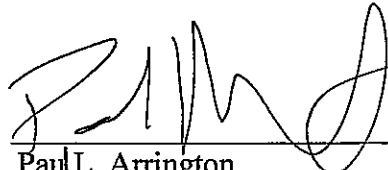
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